Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

Keith McFarland,
Petitioner,
V.

Bryan Cave LLP, Paul Weil. Marshall & Stevens, Incorporated, Carl G. Hogan, Jr. Brian J. Hogan and David Hogan,
Respondents (all).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether threats by attorney to force the production of a false business appraisal report by an appraiser were an attempt to obtain property from another for purposes of the Hobbs Act.

II.

Whether the "termination of an employee" who refused to join a conspiracy following threats of extortion in violation of the Hobbs Act was an act of racketeering proscribed by the Racketeer Influenced and Corrupt Organizations Act ("RICO").

III.

Whether a conspiracy under 18 U.S.C. § 1962(d) to violate subsections (a), (b) or (c) thereof, which by its terms authorizes the act which causes injury, is the proximate-cause of that injury.

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The opinion of the Court of Appeals is reported as *McFarland v. Weil*, Slip Copy, 2006 WL 2045696 (C.A.7 (Ill.)) (July 21, 2006); It is reproduced at the Separate Appendix at 1a. The Memorandum and Order of the District Court, dated September 21, 2004, granting the defendants' motions to dismiss is unreported and reproduced at the Separate Appendix at 9a. The order of the Circuit Court dated August 23, 2006, denying petition for rehearing is unreported and reproduced at the Separate Appendix at 18a..

JURISDICTION

The Court of Appeals entered its order on July 21, 2006, which is the subject of this petition. Plaintiff filed petition for rehearing on August 4, 2006, which was denied by the Seventh Circuit by order dated August 23, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.3 because it is being filed within 90 days of the entry of the order disposing of the petition for rehearing. This court has jurisdiction to review the order of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, and the Hobbs Act, 18 U.S.C. § 1951, both set out in Appendix at App. 14 and 15 respectfully.

STATEMENT OF THE CASE

The jurisdiction of the district court was predicated on 28 U.S.C. § 1331 involving a general federal question. Plaintiff's federal claim is based upon allegations that the defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") the predicate acts thereof included, inter alia, threats of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. The defendants filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Since those motions were granted by the district court the record consists of only the plaintiff's Second Amended Complaint.

A. Summary of Allegations of the Second Amended Complaint

Carl G. Hogan, Sr., died in January of 2001. His three sons, Carl Jr., Brian and David (the "Hogans") were the co-executors of his estate. They engaged attorney Paul Weil of the law firm of Bryan Cave LLP, to prepare and file Federal Form 706 which is the federal estate tax form used to report estate tax liability. Plaintiff alleged that Weil and the Hogans formed a scheme to generate and file false state and federal estate tax returns. To do this they anticipated engaging an appraisal firm to appraise various businesses of the estate. They would then provide the appraisal firm with false information and interfere with the appraisal firm's ability to prepare accurate appraisals.

The initial conspiracy and enterprise consisted of the Hogans and Bryan Cave LLP, acting through attorney Paul Weil.

After the initial enterprise was formed, it selected and engaged the appraisal firm of Marshall & Stevens Incorporated to prepare appraisals of five businesses of the Carl G. Hogan, Sr. Estate. Plaintiff was assigned to appraise one of the five businesses and was the appraisal director over the appraisals of other four businesses.

Plaintiff submitted the draft appraisal of his assigned business on July 23, 2001. Prior to that submission, as appraisal director, had been receiving reports from the other appraisers that Paul Weil and others at Bryan Cave LLP, were asserting undue pressure on them to state fraudulent values in their appraisals. The appraisers were receiving false and misleading information from the attorneys.

On September 3, 2001, Plaintiff and some of the other appraisers and staff working on the Hogan file participated in a teleconference with Paul Weil. During that teleconference Paul Weil attempted to influence Plaintiff's value conclusions by asserting false information. Plaintiff opined it would be illegal and unethical to go along with Weil and refused to modify his appraisal. Paul Weil responded by threatening Plaintiff. Weil told Plaintiff that he would "ruin" Plaintiff's career and lively hood. That he would email every law firm in St. Louis and see to it that Plaintiff would never work as an appraiser again if he didn't join the enterprise. These threats were made in violation of the Hobbs Act, 18 U.S.C. § 1951.

After the teleconference, Plaintiff concluded that all five of the business appraisals had been illegally influenced and that it would be a felony for his firm to

provide final appraisals. On at least two occasions Plaintiff advised the CEO of his firm of his conclusions.

At this point in time neither Marshall & Stevens Incorporated nor any of its employees or agents were in any way involved in the illegality of the scheme. They were acting at arm's length as appraisers. They were in no way involved in threatening Plaintiff or trying to influence his appraisal.

However, soon after Plaintiff advised the CEO of the illegality of continuing with the appraisals, Marshall & Stevens Incorporated renegotiated its fee with the law firm and agreed to join the enterprise. The new conspiracy agreement specifically provided that Plaintiff would be removed from working on the Hogan file and later terminated from Marshall & Stevens Incorporated.

The new conspiracy agreement was carried out. The enterprise, which Marshall & Steven Incorporated had now joined, removed Plaintiff from the Hogan file and later terminated his employment.

B. The Decisions Below

District Court Judge Michael J. Reagan dismissed the second amended complaint finding that the Supreme Court's ruling in *Beck v. Prupis*, 529 U.S. 494 (2000), held that termination of an employee is never an act of racketeering activity. The District Court therefore concluded Plaintiff lacked standing to bring a RICO claim.

The Court of Appeals heard oral argument on the parties' briefs November 9, 2005. It affirmed the District

Court by unpublished order on July 21, 2006. The Court of Appeals agreed with the District Court that *Beck* barred Plaintiff's right to bring a civil RICO claim and further indicated that the present case was indistinguishable from *Beck*.

Plaintiff's allegations with respect to the Hobbs Act extortion were not addressed by the District Court. Plaintiff noted that omission in his appellate brief and the defendants included opposition to his position in their briefs. However, the *Scheidler* cases were not cited by the parties. Rather, the issues presented by those cases were raised by the Court of Appeals at oral argument.

By order dated August 23, 2006, the District Court denied Plaintiffs petition for rehearing noting that no judge in regular active service requested a vote on rehearing en banc and that all members of the original panel voted to deny the petition for rehearing.

REASONS FOR GRANTING THE PETITION

This case presents three important issues of federal law related to the interpretation of this Court's holdings in *Scheidler v. Nat'l Org. of Women*, 537 U.S. 393, 397 (2003) ("*Scheidler II*") (*held*, "that petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act"); and *Beck v. Prupis*, 529 U.S. 494, 505 (2000) (*held*, "that injury caused by an overt act that is not an act of racketeering or otherwise unlawful under RICO, is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d). The Seventh Circuit has decided this case in direct conflict and derogation to

both of these benchmark holdings warranting certiorari.

The Seventh Circuit's decision provided an erroneous answer to the important question of whether property has been obtained for purposes of extortion under the Hobbs Act. It concluded that the extortionate threats by an attorney to force an appraiser to produce a false appraisal report were not an attempt to acquire any value in property. The Court of Appeals' decision is in direct conflict of this Court's decision in *Scheidler II* and the meaning of the Hobbs Act.

The Seventh Circuit's decision provided an erroneous answer to the important question of whether an overt act done in furtherance of a RICO conspiracy is an act of racketeering or otherwise wrongful under RICO. It concluded termination of employment *can never* qualify as a predicate act under RICO. The Court of Appeal's decision is in direct conflict this Court's decision in Beck v. Prupis and the meaning of the RICO.

Finally, the Circuit Court refused to address Plaintiff's argument that if the conspiracy agreement, *by its terms*, authorized the act that caused Plaintiff's injury, then it was therefore "otherwise wrongful" under RICO. The resolution of this issue is an important question of federal law that has not been, but should be, settled by this Court.

The following discussion compels the finding that a writ of certiorari should be granted by this Court.

I. The Decision Below Undermines this Court's Decision in *Scheidler II* and the Hobbs Act

In *Scheidler v. Nat'l Org. of Women*, 537 U.S. 393 (2003), this Court determined that anti abortion protestors did not commit extortion under the Hobbs Act by their attempts to destroy the business of the abortion clinics. The court concluded that the protestors did not obtain property from the clinics as required by the Hobbs Act. It concluded further that the protestors did not pursue an effort to gain any control of those interests for themselves, something which "they could exercise, transfer, or sell" *Id.* at 405.

The Seventh Circuit applied that ruling to the present case concluding an attorney's threats to obtain a valuable false document were not extortion for lack of property being obtained. For reasons below this is an unequivocal error in understanding this Court's analysis in *Scheidler.*

(a) THE HOBBS ACT

The relevant portions of the Hobbs Act (18 U.S.C § 1951) are set out in the Appendix hereto at 15a. However, the more portions pertinent to this petition are summarized here.

The criminal provision of the Hobbs Act is subsection (a). That section provides that anyone who obstructs commerce by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan in violation of this section is guilty of extortion. Subsection (b) defines "robbery" as the unlawful taking or obtaining of property from another, against his will, by means of violence or threats thereof. It defines "extortion" as the same taking of property by same

means except by consent of the victim.

(b) *SCHEIDLER I, II & III*

The defendants in *Scheidler* included antiabortion groups and individuals that were bent on shutting down abortion clinics through aggressive protesting. *See Scheidler I, National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994), (reversed on issues unrelated to the issues of this appeal. *Id.* at 256-262). The dispute came before the Court again in *Scheidler II, Scheidler v. Nat'l Org. of Women*, 537 U.S. 393, 399, (2003), on review of civil RICO judgments against the defendants for extortion under the Hobbs Act. The conduct by defendants at issue was interfering with and obstructing the women's right to medical services, the medical doctors' right to provide medical services, and the clinics' rights to carry on their businesses. *See Scheidler v. Nat'l Org. of Women*, 537 U.S. 393, 399 (2003).

This Court determined in *Scheidler II* that there was no acquisition of property by the protestors' attempts to shut down the abortion clinics. Although they were attempting to destroy the business interests of the doctors and the clinics, they did not pursue an effort to gain control of those interests for themselves, which "they could exercise, transfer, or sell". *Scheidler*, 537 U.S. at 404, 405, 123 S.Ct. at 1065, 1066.

For reasons unrelated to the issues now before the bar, *Scheidler III* , *Scheidler v. National Organization of Women*, 126 S.Ct. 1264, 1267 (2006) came before this Court on the issue of whether four other "acts of violence, or threats thereof" not argued in *Scheidler II*,

might support a RICO violation predicated on violence proscribed by the Hobbs Act but not related to extortion. *Id.* at 1266. But this Court held, "that physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act". *Id.* at 1270.

Implications can be drawn from these two opinions which will certainly plague the Court's docket, absent clarification.

Scheidler II refused to ascertain the outer boundaries of extortion liability under the Hobbs Act but proceeded to declare intangible rights are not protected property rights if the extortionist does not obtain a benefit in the forfeiting interests that he can "exercise, transfer or sell". Where does that leave the many circuit cases like *United States v. Tropiano*, 418 F.2d 1069, 1075 (2nd Cir. 1969)? That case involved competing trash collection businesses wherein it was upheld that the efforts to drive one of them out of business constituted extortion because the customer accounts had value. But in reality, the extortionist there wasn't obtaining control over those interests. He was only making his likelihood of success more probable by eliminating the competition. This conflict will cause immense confusion for any attorney for a plaintiff bringing an action for business interests in any remotely similar in facts to *Tropiano*.

For instance, is it now the law of the land that the characterization of your injury by violence and threat thereof is controlled by the subjective intent of the extortionists? Had the defendants in *Scheidler* been employees and staff of a competing clinic using the same tactics to shut its competitor down, would the same

result have been reached?

Or, suppose a Marxist activist phones into a bank and tells them to burn all of their cash out in the street or he'll blow up the bank. Can he escape prosecution because he, nor anyone else, obtained anything that could be exorcized, transferred, or sold?

Has *Scheidler III* essentially merged the impact on "commerce" requirement in section (a) of the Hobbs Act with the property requirement for extortion in (b)(2)? In other words, the Court has effectively made the target of one's extortion executory to obstructing, delaying or affecting commerce. It would then reasonably follow that if the property obtained doesn't have an effect on commerce, there is no extortion.

These questions are posed to illustrate the challenges the circuit courts will face in trying to address them without further guidance by this Court. That challenge will certainly divide the circuits by erroneous conclusions like the Seventh Circuit's opinion in this case.

(c) CIRCUIT COURT'S DECISION

The Seventh Circuit opined that a terminated employee cannot bring a RICO cause based on a Hobbs Act threat of extortion because no property of value flows to the person making the threat. At page three of its unpublished opinion it concluded:

> On appeal, McFarland also argues that the district court failed to consider his claim against the Defendants for violation of the Hobbs Act. His second

amended complaint, however, alleges no set of facts that constitute extortion under the Hobbs Act. See *Scheidler v. Nat'l Org. of Women*, 537 U.S. 393, 404 (2003) (The "extortion provision of the Hobbs Act ... require[s] not only the deprivation, but also the acquisition of property."). The only property at issue in this case is the valuation report. McFarland's complaint concedes that this report was not his own property, but instead was something that he created as an employee of M&S under the direction of Bryan Cave and for use by the Hogans. He has no right to pursue a claim that the defendants wrongfully acquired *their own* appraisal reports.

The circuit court places emphasis on two points in trying to analyze the opinion in *Scheidler II* regarding the acquisition of property. First it notes, by its assessment, that McFarland did not own the appraisal report. Second, it asserts, though incorrectly, that McFarland's employer, and the others, cannot wrongfully acquire their own property. [1]

(d) MCFARLAND'S CASE

The underlying facts in the present case clearly illustrate the Circuit Court's error in applying *Scheidler II* to the property at issue.

FN1 - Both points were factually incorrect in that McFarland's employer was not a member of the conspiracy when that attorney made the threats, and for reasons stated in the legal argument below, what the attorney wanted McFarland factually owned.

Prior to *Scheidler II*, the Seventh Circuit, and most other circuits, found little difficulty upholding extortion cases in which the extortionist didn't own the property or had some legal right to it. *See (United States v. Green*, 350 U.S. 415 (1956)) (union employee extorted fees for unwanted services by other members, not his own benefit); *U.S. v. Sweeney*, 262 F.2d 272 (3rd Cir. 1959) (employee ignored contract with employer and extorted fees for workers, not himself); *Robbins V. Wilkie*, 433 F.3d 755 (10th Cir. 2006) (cannot pursue legal right to easement through extortion even if you have a legal right to pursue it for government); and *United States v. Castor*, 937 F.2d 293, 299 (7th Cir.1991) (contractual rights is no defense to extortion of those rights).

Addressing McFarland's claim, it appears the Circuit Court distorted the meaning of property under the Hobbs Act as determined by the this Court in *Scheidler II*. The initial allegations were that the Hogans and the law firm conspired in violation of RICO to commit tax fraud on the state and federal governments. For that purpose they needed something from McFarland, something that might be worth millions in tax savings. Something that did not exist and would not exist unless they exerted pressure on McFarland. They needed a false or fraudulent report, which didn't exist because it is clear McFarland presented them with the honest one he prepared which they did not like.

So, it is further alleged, in order to further the conspiracy, they resorted to extortion to get McFarland to produce want they wanted, the false appraisal report which no doubt was valuable to their pursuits. The extortion attempts at first consisted of threats made by the attorney before McFarland's employer had joined

the scheme.

Based on the initial events of the extortion attempts, McFarland has pled enough for a valid claim under the Hobbs Act. He was threatened by the attorney to give up a false report and the labor it took to produce the same, in return for the attorney not destroying his career. Contrary to the Seventh Circuit's conclusions, the sought after appraisal had considerable value to the extortionists in ripping off the government in taxes.

In light of this Court's decision in *Scheidler II*, McFarland's Hobbs Act extortion claim should not have been dismissed since the property attempted to be acquired had actual and substantial value that would have ended up in the hands of the extortionists. Further, absent review by this Court, other circuits will obviously make similar and repeated errors.

II. The Decision Below Undermines this Court's Decision in *Beck v. Prupis* and the RICO Act

The Seventh Circuit's decision provided an erroneous answer to the important question of whether an overt act done in furtherance of a RICO conspiracy is an act of racketeering or otherwise wrongful under RICO. The Circuit Court has effectively amended the RICO Act by creating a new federal law that excepts all "terminated employees" from ever claiming they are victims of any predicate act enumerated under § 1961(1) of the RICO Act. This new exception will have a chilling effect on the jurisprudence of RICO if not addressed by this Court. An absolute rule that defines every "terminated employee" as an exception to the application of the

underlying racketeering offenses under RICO, is a derogation to the RICO Act and the fundamental principles of proximate-cause established by this Court's opinions in *Sedima, Holmes. Anza* and even more particularly *Beck v. Prupis.*

Therefore, this Petition should be granted to resolve the issues presented by the Seventh Circuit's apparent usurpation of the powers of the legislative branch.

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985), this Court recognized a less stringent requirement for pleading in that a plaintiff does not have to establish some type of racketeering injury as opposed to one caused by predicate acts enumerated in § 1961(1). The Court concluded:

> But the statute [RICO] requires no more than this. Where the plaintiff alleges each element of the violation [§ 1962(a)-(c)], the compensable injury necessarily is the harm caused by predicate acts [§ 1961(1)] sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.

Sedima, S.P.R.L. v. Imrex Co. 474 U.S. at 497. The Court's ruling negated the suggestion that something more than a predicate act must cause the injury to succeed in a RICO claim. However, it should be noted that a conspiracy claim under § 1962(d) was not before the Court, rather it was the substantive violation under subsection (c) thereto.

The inquiry to proximate-cause of RICO injuries

begins with *Sedima* and provides that, other than conspiracies, the plaintiff prosecuting a substantive offense who successfully pleads the cause, is not required to prove the injury was caused by anything other than the predicate acts. Accordingly, the Court did not foreclose the possibility a claim for injury caused by an act that was not a predicate act.

The issue of injuries caused by conspiracies under RICO was later taken up by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). If you applied a "but for" test to a RICO conspiracy, it is conceivable one could connect just about any injury to a RICO conspiracy by factual circumstances. A conspiracy to run an auto theft operation will undoubtedly injure the insurers of the stolen vehicles. The Court in *Holmes* was faced with this type of RICO injury claim due to a conspiracy involving a stock price manipulation scheme. *Id* at 261-262. The Court observed that justice required some type of limit for one's responsibility for his wrongs. In addition to requiring a factual connection to the injury or "but for" test, the Court ruled that "proximate cause" would be required for RICO injuries. *Id.* at 268-269.

Although no hard rule is gained by *Holmes* in determining what the "limit" of one's responsibility is under RICO, the Court strongly implied a claim for harm based on wrongs done to a third person by defendant would be deemed "to remote" for recovery. *Id.* at 268-269.

This Court revisited injuries related to RICO conspiracies in *Beck v. Prupis*, 529 U.S. 494 (2000). At issue was the termination of an employee which was an

overt act in furtherance of the underlying wire and mail fraud RICO conspiracy, but not a predicate act as defined by the statute. *Id.* at 498-499. The Court held, "that injury caused by an overt act that is not an act of racketeering *or otherwise wrongful under RICO*, is not sufficient to give rise to a cause of action. . . ." *Id.* at 505. Although the Court found the circumstances of the plaintiff's termination did not constitute a predicate act, it did not proclaim the act of termination could never amount to a predicate act under § 1961(1).

Recently before this Court were two competitors in the same line of business, one of which claimed a RICO injury due to the other's tax fraud and wire fraud scheme to avoid paying state sales taxes which allegedly gave it an economic advantage over the plaintiff. *See Anza v. Ideal Steel Supply Corp.*, 126 S.Ct. 1991 (2006). Resting its analysis primarily on *Holmes,* the Court determined that the plaintiff's injury due to the defendant's scheme of not paying sales taxes failed the proximate-cause test as being too remote. *Id* at 1996-1997. The Court noted that the "direct victim " of the tax scheme was the state, not the plaintiff, and that it had previously indicated in *Sedima*, that an injury flowing from a substantive RICO offense is the harm caused by the predicate acts that established the pattern. *Id.* at 1996.

Turning to the plaintiff's plight in this matter, the Seventh Circuit ascertained that *Beck* mandated that a terminated employee can never bring a civil RICO action if the only damages claimed were from his of employment. It reached this conclusion by its reading of the Court's opinion in *Beck*. But that is not the conclusion reached in *Beck*. Rather, the Court

concluded the overt act of which a plaintiff complains must be either an act of racketeering (predicate act) or otherwise unlawful under the RICO. *Beck* v. *Prupis*, at 507.

The facts clearly lend favor to the possibility that McFarland's termination was in fact a predicate act, to wit; the alleged extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, discussed above. The plaintiff had alleged that the attorney, the law firm and the Hogans initially conspired to "generate false state and federal estate tax returns for" the Hogan Estate by acquiring false appraisal reports. (Second Amended Complaint, page 7). The conspiracy consisted of a "scheme" to engage an appraisal firm to conduct appraisals for which the conspirators would provide false information to cause false appraisal reports. *Id.* at 7. The first mention of a predicate act in the complaint was the rendition of the threats by the attorney which were alleged to be a violation of the Hobbs Act. *Id.* at 10. The first racketeering activity alleged to be contemplated by the enterprise was violating 18 U.S.C. § 1957 in that the enterprise sought to engage in monetary transactions involving criminally derived money through disbursements by the Hogan Estate. *Id.* at 12. The next predicate act alleged, was another reference to the Hobbs Act threats which were "committed in furtherance of the conspiracy and as a necessary component" thereof. *Id.* at 13. It is finally alleged that "contemplated in the conspiracy" was that they would "necessarily violate" the mail fraud and wire fraud provisions to communicate to facilitate the scheme. *Id.* at. 13-14.

With the layout of the conspiracy and predicate acts, together with the analysis of the application of the

Hobbs Act above, it is almost without argument that the plaintiff's termination was a predicate act as part of the Hobbs Act violation. Therefore the implications of *Beck* should not bar the plaintiff's claim as the Seventh Circuit has erroneously concluded.

It took this Court over 20 years to carefully work through the analysis related to the proximate-cause of RICO injuries beginning with *Sedima* and continuing up until recently with *Anza*. Yet, the Seventh Circuit has readily deprived the plaintiff from having his day in court by creating new federal law that excludes the plaintiff from application of the predicate acts. Many others finding themselves in similar situations to the plaintiffs will also be barred unless certiorari is granted.

III. "Otherwise Wrongful" Act Under RICO

The plaintiff argued before the Seventh Circuit that in the alternative, the second conspiracy agreement in which the plaintiff's employer joined, and which specifically called for the plaintiff's termination, was "otherwise wrongful" under RICO and should therefore provide standing for Plaintiff's claim.

This Court in *Beck v. Prupis*, 529 U.S. 494 (2000), held that injury caused by an overt act not a predicate act or *"otherwise wrongful under RICO"* is not actionable in RICO conspiracy. *Id.* at 505. (emphasis added).

The emphasized wording above was not included in the 11th Circuit's lower opinion in *Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998). This Court's insertion of that additional language must imply there might be RICO standing for an injury caused by conduct that is not a

predicate act but which might be otherwise unlawful under RICO. The only provision of § 1962 which makes acts other than acts of racketeering unlawful, is § 1962(d), which makes it unlawful for any person to conspire to violate subparagraphs (a). (b) or (c), of § 1962. One can deduce that since the only provision of RICO that makes something other than the substantive acts wrongful, is § 1962(d), any act that is otherwise wrongful has to be expressly authorized in the conspiracy agreement. Nothing else is made wrongful by the wording of the RICO Act.

Plaintiff alleged that the initial conspiracy agreement in the present case did not include his employer nor anyone else in his firm. The lawyers and the Hogans were the only members and hoped to accomplish their goal by deceiving the appraisers. When all attempts by them failed to influence the plaintiff, it is alleged the enterprise then sought out the plaintiff's employer, renegotiated its fee with them to entice them to join the conspiracy, for the specific purpose of exerting additional pressure on the plaintiff and terminating him if all else failed. Thereafter, a second conspiracy agreement was formed which included the plaintiff s employer and the specific authorization, if not the mandate, of his termination.

If § 1962(d) makes it illegal to conspire to violate (a), (b) or (c), then the agreement itself is illegal. It would follow that any specific acts directed by such an illegal agreement would themselves be illegal and actionable as "otherwise wrongful" under RICO. The conspiracy agreement of which the plaintiff complained specifically authorized his termination. He was therefore terminated by an act that was "otherwise wrongful"

under RICO.

The only other apparent possibility is by this Court's commentary that the determination of an "otherwise wrongful" act "may depend on the underlying substantive violation the defendant is alleged to have committed." *Beck v. Prupis*, at 506. The plaintiff has alleged the underlying offense of extortion under the Hobbs Act, specifically threatening his career if he did not generate a false appraisal report. Logic would compel the conclusion that his termination was directly related to the underlying charge. He was the "direct victim" of Hobbs Act threats of extortion which effectuated his termination.

This Court should expand the actionable wrongs under RICO by holding that a conspiracy under 18 U.S.C. § 1962(d) to violate subsections (a), (b) or (c), which by its terms authorizes the act which causes an injury, is the proximate-cause of that injury. At the very least, whether or not the Court should make such a holding is an important question of federal law which should be settled by this Court.

CONCLUSION

The foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In the Supreme Court of the United States

Keith McFarland,
Petitioner,

V.

Bryan Cave LLP, Paul Weil. Marshall & Stevens, Incorporated, Carl G. Hogan, Jr. Brian J. Hogan and David Hogan,
Respondents (all).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SEPARATE APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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(Cite as Slip Copy)

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McFarland v. WeilC.A.7 (Ill.),2006.This case was not selected for publication in the Federal Reporter. UNPUBLISHED ORDER Not to be cited per Circuit Rule 53Please use FIND to look at the applicable circuit court rule before citing this opinion. Seventh Circuit Rule 53. (FIND CTA7 Rule 53.)

United States Court of Appeals, Seventh Circuit.

Keith MCFARLAND, Plaintiff-Appellant,

v.

Paul WEIL, Marshall & Stevens, Inc., Carl Hogan, Jr., et al., Defendants-Appellees.

No. 04-3719.

Argued Nov. 9, 2005.
Decided July 21, 2006.
Rehearing and Rehearing En Banc Denied Aug. 23, 2006.[FN*]

Background: Former employee of appraisal firm brought action against his former employer, law firm, attorney, and co-executors of an estate, alleging that defendants conspired to generate fraudulent federal tax returns by providing false information about estate's assets and accounting records to cooperating appraisal firms, and asserting claims for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), violation of the

Hobbs Act, and two state law claims for tortious interference with contract and slander. The United States District Court for the Southern District of Illinois, Michael J. Reagan, dismissed the claims, and employee appealed.

Holdings: The Court of Appeals held that:

(1) employee's termination, allegedly in furtherance of the conspiracy, was not independently wrongful under any substantive provision of RICO, and, thus, injury caused by such act was not sufficient to give rise to cause of action under RICO, and

(2) employee had no right to pursue extortion claim under the Hobbs Act based on defendants' alleged wrongful acquisition of appraisal reports he prepared.

Affirmed.



[1] Conspiracy 91

91 Conspiracy
Termination of appraiser, allegedly in furtherance of Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy by which appraisal firm, law firm, attorney, and co-executors of an estate sought to generate fraudulent federal tax returns by providing false information about estate's assets and accounting records to cooperating appraisal firms, was not independently wrongful under any substantive provision of RICO, and, thus, injury caused by such act was not sufficient to give rise to cause of action under RICO. 18 U.S.C.A. § 1961 et seq.

[2] Extortion and Threats 165

165 Extortion and Threats
Appraiser had no right to pursue extortion claim under the Hobbs Act based on alleged wrongful acquisition of appraisal reports by appraisal firm for whom he worked, law firm, attorney, and co-executors of an estate, where report was not appraiser's own property, but instead was something that he created as an employee of appraisal firm under the direction of attorney and for use by co-executors. 18 U.S.C.A. § 1951(b)(2).

Appeal from the United States District Court for the Southern District of Illinois. No. 03-CV-0433-MJR. Michael J. Reagan, Judge.
Daniel F. Goggin, Greenville, IL, for Plaintiff-Appellant. Robert H. Shultz, Heyl, Royster, Voelker & Allen, Edwardsville, IL, Karen L. Kendall, Craig L. Unrath, Heyl, Royster, Voelker & Allen Peoria, IL, Russell Scott, Emily C. Singley, Greensfelder, Hemker & Gale, Swansea, IL, for Defendants-Appellees.

Before Hon. RICHARD A. POSNER, Hon. ILANA DIAMOND ROVNER, and Hon. DIANE P. WOOD, Circuit Judges.

ORDER

*1 Keith McFarland sued his former employer, Marshall & Stevens, Inc .(M & S); the law firm of Bryan Cave LLP; a Bryan Cave attorney, Paul Weil; and three relatives of former Bryan Cave client Carl G. Hogan, Sr., alleging a conspiracy to violate various provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c)-(d), 1964(c); violation of the Hobbs Act,

18 U.S.C. § 1951; and two state law claims for tortious interference with contract and slander. The district court dismissed McFarland's federal claims with prejudice for failure to state a claim upon which relief could be granted, see Fed.R.Civ.P. 12(b)(6), and declined to exercise its supplemental jurisdiction over his state law claims, see 28 U.S.C. § 1367(c)(1), which it dismissed without prejudice. McFarland appealed, and we now affirm.

We review *de novo* the dismissal of McFarland's complaint under Rule 12(b)(6), accepting the following factual allegations as true and drawing all reasonable inferences in favor of McFarland. See *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 971 (7th Cir.2002). On January 14, 2001, Carl G. Hogan, Sr., died. Acting as co-executors of his estate, Hogan's three sons, defendants Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan, hired Weil, a Bryan Cave attorney, to prepare a federal estate tax return. According to McFarland, Hogan's sons and Weil conspired to generate fraudulent federal tax returns for Hogan's estate by providing false information about the estate's assets and accounting records to cooperating appraisal firms.
At some point after the alleged conspiracy began, Bryan Cave engaged M & S, a national valuation firm, for assistance in preparing Hogan's federal estate tax return. McFarland, who worked as the Appraisal Director for M & S's St. Louis office, was assigned the task of completing an appraisal report for the Hogan Real Estate Development Partnership, one of the Hogan estate's assets. McFarland alleges that upon submitting his draft appraisal report, the Hogans, Weil, and various senior M & S appraisers, under the influence of Bryan Cave attorneys, attempted to persuade him to alter his

conclusions. When he refused to modify his report, they threatened to contact every law firm in the St. Louis area in an effort to prevent him from working as an appraiser in the future. On at least two occasions, McFarland contacted M & S's CEO to inform him about the fraud and to recommend that M & S withdraw from the project; both attempts proved futile. In his complaint, McFarland alleges that after M & S renegotiated its fee with Bryan Cave, M & S and the other defendants agreed that McFarland posed a risk to their scheme. At that point, M & S removed McFarland from the Hogan Estate working group; later, it terminated him. McFarland also claims that the defendants agreed to destroy his draft appraisal report; the final report reflected values based on the false information that McFarland refused to include.

*2 Shortly after his termination, McFarland filed a one-count complaint in federal court alleging that the defendants conspired to violate RICO. See 18 U.S.C. § 1962(d). Defendants promptly filed motions to dismiss the complaint, and McFarland sought leave to amend, which the district court granted. On November 19, 2003, the district court held an off-the-record status conference during which it informed McFarland and his counsel of the heightened pleading requirements for RICO claims. The district court then granted McFarland leave to file a second amended complaint, which the defendants again moved to dismiss pursuant to Rule 12(b)(6). In an order dated September 21, 2004, the district court granted defendants' motions to dismiss McFarland's RICO claim. It reasoned that McFarland lacked standing under the Supreme Court's decision in *Beck v. Prupis*, 529 U.S. 494, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000), because he was not injured by an

act of racketeering. (The district court's order granting Defendants' motions to dismiss does not specifically mention Weil. We were assured at oral argument, however, that this omission was an oversight by the district court and that the case against Weil is also over.)

[1] The district court correctly concluded that McFarland's RICO claim is foreclosed by *Beck*. In *Beck*, under a set of facts indistinguishable in all material respects from this case, the Court held that "a civil conspiracy plaintiff cannot bring suit under RICO based on *any* act in furtherance of the conspiracy that might have caused the plaintiff injury," "[r]ather ... a RICO conspiracy plaintiff [must] allege injury from ... an act that is *independently unlawful* under RICO." 529 U.S. at 505-06 (emphasis added). McFarland attempts to distinguish *Beck* by arguing that, unlike Beck, he was the actual target of racketeering activity because the Defendants needed his work product, namely the appraisal report, to carry out their scheme; this argument, however, is irrelevant to the RICO standing analysis. In fact, *Beck* itself provides a stronger example of a plaintiff who was "specifically targeted" for unlawful activity, given that Beck alleged that the defendants in his case created an independent scheme for the sole purpose of firing him, which included hiring an independent insurance company to falsify reports against him and provide cause for his termination. The Supreme Court has made it clear that a RICO plaintiff has standing to recover only "to the extent that, he has been injured in his business or property by conduct constituting the violation," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), which in this case would be the Defendants' alleged efforts to defraud the government by filing false

tax documents.

There is no doubt that the injuries about which McFarland complains and the corresponding relief that he seeks (namely, payment for loss of income and past and future pecuniary losses), were proximately caused by his termination, which, wrongful or otherwise, is not an act of racketeering for purposes of RICO. See, *e.g.*, *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d. Cir.1990) ("loss of employment ... for reporting or refusing to participate in an enterprise engaging a pattern of racketeering activity is not injury sufficient for standing"); *Nordine v. Textron, Inc.*, 819 F.2d 347, 349 (1st Cir.1987) (noting that plaintiff's injury resulted only from defendant's decision to terminate him for reporting alleged RICO violations, and although "firing [the plaintiff] under these circumstances was wrong, ... it did not violate the RICO Act"); 18 U.S.C. § 1962(a)-(c) (listing unlawful practices under RICO, none of which are employment termination or retaliation). See also *Anza v. Ideal Steel Supply Corp.*, --- U.S. ----, ----, 126 S.Ct. 1991, 1994, 164 L.Ed.2d 720, ---- (2006) (holding that a plaintiff may sue under 18 U.S.C. § 1962(c), a different provision of RICO, "only if the alleged RICO violation was the proximate cause of the plaintiff's injury").

*3 [2] On appeal, McFarland also argues that the district court failed to consider his claim against the Defendants for violation of the Hobbs Act. His second amended complaint, however, alleges no set of facts that constitute extortion under the Hobbs Act. See *Scheidler v. Nat'l Org. of Women*, 537 U.S. 393, 404, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003) (The "extortion provision of the Hobbs Act ... require[s] not only the deprivation, but also the acquisition of property."). The only property

at issue in this case is the valuation report. McFarland's complaint concedes that this report was not his own property, but instead was something that he created as an employee of M & S under the direction of Bryan Cave and for use by the Hogans. He has no right to pursue a claim that the defendants wrongfully acquired *their own* appraisal reports.

Although McFarland is unable to take advantage of the treble damages provisions for federal claims brought under RICO, we note in closing that his state law claims for tortious interference of contract and slander were dismissed without prejudice. He is of course at liberty to refile these claims in state court and see how they fare in that tribunal. We express no opinion on the latter point.

The judgment of the district court is Affirmed.

> FN* Circuit Judge Ann Claire Williams did not participate in the consideration of this Petition for rehearing en banc.

C.A.7 (Ill.),2006.
McFarland v. Weil
Slip Copy, 2006 WL 2045696 (C.A.7 (Ill.)), RICO Bus.Disp.Guide 11,111
Briefs and Other Related Documents (Back to top)
• 04-3719 (Docket) (Oct. 22, 2004)
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

KEITH McFARLAND	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 03-cv-0433-MJR
	)	
BRYAN CAVE LLP,	)	
PAUL WEIL, MARSHALL	)	
& STEVENS INC.,	)	
CARL G. HOGAN, JR.,	)	
BRIAN J. HOGAN, and	)	
DAVID HOGAN	)	
	)	
Defendants.	)	

MEMORANDUM and ORDER

REAGAN, District Judge:

Plaintiff Keith McFarland filed in this Court his three-count second amended complaint against Defendants Bryan Cave LLP (Bryan Cave), Paul Weil, Marshall & Stevens Inc. (M&S), Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan (Doc. 23). The complaint arises out of McFarland's allegations that Defendants entered into a "conspiracy" to violate RICO by allegedly agreeing to file a false federal estate tax return for the estate of Carl G. Hogan, Sr. Count One claims the Defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). Count Two alleges the Defendants tortiously interfered with McFarland's contractual rights. Count Three alleges the Defendants

slandered McFarland's character.

Now before the Court is Defendant M&S' "Motion to Dismiss the Second Amended Complaint for Failure to State a Claim" (Doc. 28) and memorandum of law in support (Doc. 29) and Defendants Bryan Cave and the Hogans' "Motion to Dismiss Complaint and Memorandum in Support" (Doc. 31). McFarland responded in opposition to M&S' motion at Doc. 37, to which M&S replied at Doc. 39. McFarland responded in opposition to Defendants Bryan Cave and the Hogans' motion at Doc. 36, to which Defendants Bryan Cave and the Hogans replied at Doc. 40. The Court begins its analysis with a brief recitation of the key facts and procedural history.

Key Facts and Procedural History

In 2001, McFarland worked as an appraiser for M&S, an appraisal firm. On January 14, 2001, Carl G. Hogan, Sr., died. His three sons, Defendants herein, were the co-executors of his estate. Bryan Cave, a St. Louis based law firm, engaged M&S to assist in the preparation of a federal estate tax return for the estate of Carl G. Hogan, Sr. (the Hogan estate). M&S then assigned McFarland to provide assistance by preparing appraisals for the Hogan estate.

McFarland states in his complaint that he submitted a draft proposal concerning one of the assets included in the Hogan estate, and the parties herein disagreed regarding the values he submitted. McFarland claims he was asked to assert false values and thereby participate in a tax fraud scheme, but refused to participate. Consequently, McFarland claims he was removed from

working on the Hogan file and after some time passed, later terminated.

McFarland then filed his original one-count complaint in this Court bringing a civil cause of action for conspiracy under RICO pursuant to this Court's jurisdiction under 18 U.S.C. 1331 (Doc. 1). Defendants then filed motions to dismiss the complaint (Docs. 4 and 6) and thereafter, McFarland sought leave to amend his complaint (Doc. 11). The Court granted McFarland leave to file his first amended complaint and McFarland did so, adding his claim for tortious interference with contract pursuant to this Court's supplemental jurisdiction under 18 U.S.C. 1367 (Doc. 16).

The Court then held an off-the-record status conference in this matter on November 19, 2003, during which the Court alerted McFarland's counsel as to the heightened pleading requirements for fraud claims alleged under RICO and that McFarland must plead in good faith and be able to prove all allegations. The Court then granted McFarland leave to file a second amended complaint. *See* Doc. 20. McFarland then filed his second amended complaint on December 29, 2003 (Doc. 23) in which he added a third count, the slander count. In his second amended complaint, McFarland seeks injunctive relief, lost income and pre-judgment interest, compensation for past and future pecuniary losses, and compensation for past and future non-pecuniary losses. McFarland also seeks benefit of RICO's treble damages provision as well as punitive damages.

Applicable Legal Standards

When reviewing a complaint in the context of a

dismissal motion filed under FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6), the Court accepts as true all well-pled factual allegations and resolves in the plaintiff's favor all reasonable inferences. *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 625 (7th Cir. 2001), *citing Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001).

Dismissal for failure to state a claim is proper only if the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. *Alper v. Altheimer & Gray*, 257 F.3d 680, 684 (7th Cir. 2001), *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and *Veazey v. Communications & Cable of Chicago, Inc.*, 194 F.3d 850, 854 (7th Cir. 1999). *Accord Galdikas v. Fagan*, 342 F.3d 684, 686 (7th Cir. 2003)("Dismissal is proper if it appears beyond doubt that the plaintiffs cannot prove any set of facts entitling them to relief.").

If it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate. *Alper* at 684, *quoting Veazey*, 194 F.3d at 854.

Analysis

In M&S' motion to dismiss and memorandum in support, M&S argues that Count One should be dismissed as: (1) McFarland lacks standing under *Beck v. Prupis*, 529 U.S. 494 (2000), as he has not been injured by an act of racketeering; (2) McFarland's injuries are insufficient to give rise to a RICO cause of action; (3) there is no causal connection between McFarland's alleged injuries and Defendants' purported

RICO violations; and (4) McFarland fails to plead the essential elements of his RICO claim (Docs. 28 and 29). The rest of the Defendants in their motion to dismiss and memorandum in support argue that Count One should be dismissed as: (1) McFarland lacks standing under RICO as he has not been injured by an act of racketeering; (2) McFarland has not alleged a pattern of racketeering; and (3) McFarland fails to plead his RICO claim with particularity. As both of the motions to dismiss argue Count One should be dismissed as to all Defendants as McFarland lacks standing to bring the RICO claim since he has not been injured by an act or racketeering, and this issue is dispositive, the Court declines to address the other issues raised by the Defendants.

In his second amended complaint McFarland bases his RICO claim on 18 U.S.C. 1962©) and (d). RICO creates a civil cause of action for "any person injured in his business or property by reason of a violation of Section 1962." *Beck v. Prupis*, 529 U.S. 494, 495 (2000)(quoting 18 U.S.C. 1964©)). Section 1962(c) makes it unlawful for:

> any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d), in turn, provides that "it shall be unlawful for any person to conspire to violate any of the provisions of section (a), (b) or (c) of this section."

Therefore, in order to have standing under RICO, McFarland must have sustained an injury to his business or property that was proximately caused by some act of the Defendants that was an "act of racketeering or otherwise unlawful under [RICO]." *Beck v. Prupis*, 529 U.S. 494, 495 (2000). *See also* 18 U.S.C. 1964(c) (conferring RICO standing on any person injured in his business or property by reason of a violation of Section 1962). The Defendants argue that McFarland has not been injured by an act of racketeering sufficient to bring a RICO claim in light of the Supreme Court's decision in *Beck v. Prupis*, 529 U.S. 494 (2000). The Court agrees.

In *Beck*, the plaintiff, a former president, CEO, director and shareholder of a corporation that wrote surety bonds for construction contractors, sued the corporation's senior officers and directors asserting a civil cause of action under Section 1964(c). The plaintiff discovered the defendants were demanding fees from contractors in exchange for qualifying them for the corporation's surety bonds, diverting corporate funds for personal uses, and submitting false financial statements to regulators, shareholders and creditors. *Beck*, 529 U.S. at 498. The plaintiff's theory was that his injury was proximately caused by an overt act, the termination of his employment, done in furtherance of the defendants' conspiracy, and that Section 1964(c) therefore provided a cause of action. The Supreme Court held that termination of employment is not a racketeering activity, and as such, is not a sufficient overt act so as to bring a civil RICO conspiracy claim under Section 1964(c) for a violation of Section 1962(d). *Id.* at 500.

McFarland argues that the case at bar is

distinguishable from *Beck* in that he was engaged in commerce that was being utilized as a tool for the conspiracy, and if the Defendants had not interfered with that commerce, McFarland would have produced the accurate appraisals. However, this argument still ignores the fact that what *proximately caused* McFarland injury, was the termination of his employment bringing the case within the ambit of *Beck*. All the damages he seeks result from his loss of employment as an appraiser for M&S.

In McFarland's second amended complaint, he pleads that: "Plaintiff refused to participate in deriving false value conclusions and refused to sign or affix his signature to said appraisal which effectuated him being removed from working on the Hogan File by the enterprise and then later being terminated from employment with [M&S]" (Doc. 23). It is that termination the injuries stem from, and while he may have a wrongful termination claim, wrongful termination is not a racketeering act. *Cf. O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1987)(neither retaliatory discharge for blowing the whistle or refusal to participate in illegal activity are grounds for a RICO conspiracy claim);*Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir. 1993); *Miranda v. Ponce Fed. Bank*, Case 3:03-cv-00433-MJR-GBC 948 F.2d 41 (1st Cir. 1991). *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294-95 (9th Cir. 1990); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990). The rationale behind the requirement that a plaintiff's injuries must have been proximately caused by acts of racketeering is that RICO was enacted with an express target – racketeering activity – and only those injuries that are proximately caused by racketeering activity should be actionable under the statute. *Beck v.*

Prupis, 162 F.3d 1090 (11th Cir. 1998). As a result, McFarland does not have standing to bring a RICO claim as he has not been injured by an act of racketeering.

This Court, following the guidance of the United States Court of Appeals for the Seventh Circuit, liberally grants leave to amend complaints. Indeed, in the instant case McFarland is on his third attempt to state a viable RICO claim. The Court, as stated earlier, cautioned McFarland regarding the heightened pleading requirements for a civil RICO claim. The facts of this case are fatal to pleading a viable RICO case such that further amendment would be futile because Plaintiff cannot plead he was injured by an act of racketeering. Consequently, dismissal herein lies with prejudice.

Conclusion

The Court hereby GRANTS in part and DENIES AS MOOT in part Defendant Marshall & Stevens, Inc.'s motion to dismiss (Doc. 28) and Defendants Bryan Cave LLP, Carl G. Hogan, Jr., Brian J. Hogan, Jr., and David Hogan's motion to dismiss (Doc. 31). The motions are *granted* in that the Court DISMISSES *with prejudice* Count One of Plaintiff McFarland's second amended complaint. As the Court dismisses the sole federal law claim, the court *denies as moot* without prejudice the rest of the motions as they pertain to the state law causes of action since the Court declines to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. 1367(c)(1). *See, e.g., Centres, Inc. v. Town of Brookfield, Wisc.*, 148 F.3d 699, 704 (7th Cir. 1998). Accordingly, the Court DISMISSES *without prejudice* Counts Two and Three of Plaintiff McFarland's second amended complaint due to lack of subject matter

jurisdiction. This matter is now CLOSED.

IT IS SO ORDERED.

DATED this 21st day of September, 2004.

s/Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 23, 2006

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

Hon. DIANE P. WOOD, Circuit- Judge

No. 04-3719

KEITH MCFARLAND,
Plaintiff-Appellant,

v.

PAUL WEIL, MARSHALL & STEVENS, INCORPORATED, CARL HOGAN, JR., et al.,
Defendan ts-Appellees.

Appeal from the United States District Court for the So. Dist. of IL

No. 03-C-433

ORDER

On consideration of the Petition for Rehearing and Rehearing En Banc filed by counsel for Plaintiff-Appellant McFarland on August 7, 2006, no judgeA in regular active service requested a vote on rehearing en banc. All members of the original panel voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby, DENIED.

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[*]Circuit Judge Ann Claire Williams did not participate in the consideration of the Petition for rehearing en banc.

18 U.S.C. § 1962. Prohibited Activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce,

to conduct or participate, directly or indirectly, in the conduct of such enterprises affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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18 U.S.C. § 1964. Civil remedies.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

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18 U.S.C. § 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside

such State; and all other commerce over which the United States has jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

KEITH MCFARLAND,

Plaintiff,

v.

Civil Action No. 03-433-MJR

BRYAN CAVE LLP, PAUL WEIL,
MARSHALL & STEVENS INCORPORATED,
CARL G. HOGAN, JR., BRIAN J. HOGAN, and
DAVID HOGAN,

Defendants.

SECOND AMENDED COMPLAINT

COUNT I

The Plaintiff, Keith McFarland, by and through his attorney, Daniel F. Goggin, for his complaint herein, alleges as follows:

NATURE OF ACTION

This is an action to recover damages sustained by the plaintiff caused by the fraudulent and tortious conduct of defendants, and to restrain defendants and their co-conspirators from engaging in fraud and other unlawful conduct in the future.

This action is brought pursuant to 18 U.S.C. § 1964(c) regarding Racketeer Influenced and Corrupt Organizations, to correct unlawful practices by defendants herein, in committing and conspiring to commit violations of 18 U.S.C. § 1962 subsection (c), and whose actions in furtherance of those conspiracies injured plaintiff in his business and property.

In all relevant respects, defendants acted in concert with each other in order to further their fraudulent scheme. Beginning not later than September, 2001, defendants, their various agents and employees, and their co-conspirators, form an "enterprise" (the "Enterprise" herein) as that term is defined in 18 U.S.C. § 1961(4). That Enterprise has functioned as an organized association-in-fact since 2001 to achieve its goal, through illegal means, of receiving illegal funds derived by falsifying both federal and state estate tax returns and avoiding the consequences of its actions. Each defendant has participated in the operation and management of the Enterprise, and has committed numerous acts to maintain and expand the Enterprise.

In order to avoid discovery of their fraudulent conduct and the possibility that they might be called to account for their conduct, defendants engaged in a scheme to ruin and discredit the plaintiff by making false and deceptive statements and concealing documents that they knew would have exposed their illegal conduct.

The effect of defendants' fraudulent scheme and

wrongful conduct continues to this day; defendants continue to enjoy the illegal funds obtained by their unlawful and tortious conduct and continue to conceal their activity from the authorities; and unless restrained by this Court, defendants are likely to continue their unlawful activities into the future.

I. JURISDICTION AND VENUE

Jurisdiction of this Court is invoked in part pursuant to 28 U.S.C. § 1331. This action is authorized pursuant 18 U.S.C. § 1964(c), and is based on 18 U.S.C. § 1962(d) conspiracies to violate 18 U.S.C. § 1962(C).

Plaintiff, Keith McFarland, resides at Greenville, Illinois, in the Southern District of Illinois. He was employed by the defendant, Marshall & Stevens Incorporation, for more than 15 years and much of his duties of employment with said defendant were executed in the Southern District of Illinois. Plaintiff began his employment with Marshall & Stevens Incorporation at its Illinois office in Chicago, Illinois.

Defendant, Bryan Cave LLP, has law offices in Illinois and conducts much of its affairs in the Southern District of Illinois making said district appropriate for venue pursuant to 18 U.S.C. § 1965 (a).

Defendant, Marshall & Stevens Incorporated, has appraisal offices in Illinois and conducts much of its affairs in the Southern District of Illinois making said district appropriate for venue pursuant to 18 U.S.C. §

1965 (a).

II. PARTIES

Plaintiff, Keith McFarland is an individual citizen and protected by the laws of the United States.

At all relevant times the defendant, Bryan Cave LLP, has continuously been and is now a limited liability partnership doing business in the Southern District of Illinois. At all relevant times said defendant acted as a fiduciary for the Estate of Carl G. Hogan, Sr. At all times pertinent to this Complaint, said defendant individually and through its agents, materially participated in the Enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful and fraudulent conduct alleged herein, and has affected interstate commerce in the United States, including the Southern District of Illinois.

At all relevant times the defendant, Paul Weil, was an individual citizen acting as a fiduciary for the Estate of Carl G. Hogan, Sr, and as agent for the defendant, Bryan Cave LLP. At all times pertinent to this Complaint, said defendant individually and through his agents, materially participated in the Enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful and fraudulent conduct alleged herein, and has affected interstate commerce in the United States, including the Southern District of

Illinois.

At all relevant times defendant, Marshall & Stevens Incorporation (M & S herein), has continuously been and is now a Missouri corporation doing business in the Southern District of Illinois. At times pertinent to this Complaint, said defendant individually and through its agents, materially participated in the Enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful and fraudulent conduct alleged herein, and has affected interstate commerce in the United States, including the Southern District of Illinois.

At all relevant times the defendant, Carl G. Hogan, Jr., was an individual citizen acting as a fiduciary for the Estate of Carl G. Hogan, Sr. At all times pertinent to this Complaint, said defendant individually and through his agents, materially participated in the Enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful and fraudulent conduct alleged herein, and has affected interstate commerce in the United States, including the Southern District of Illinois.

At all relevant times the defendant, Brian J. Hogan, was an individual citizen acting as a fiduciary for the Estate of Carl G. Hogan, Sr. At all times pertinent to this Complaint, said defendant individually and through his agents, materially participated in the Enterprise, and

materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful and fraudulent conduct alleged herein, and has affected interstate commerce in the United States, including the Southern District of Illinois.

At all relevant times the defendant, David Hogan, was an individual citizen acting as a fiduciary for the Estate of Carl G. Hogan, Sr. At all times pertinent to this Complaint, said defendant individually and through his agents, materially participated in the Enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful and fraudulent conduct alleged herein, and has affected interstate commerce in the United States, including the Southern District of Illinois.

At all relevant times, each defendant was a "person" within the meaning of 18 U.S.C. § 1961(3), because each defendant was "capable of holding a legal or beneficial interest in property."

III. STATEMENT OF CLAIM

A. The Formation of the Enterprise and the Nature of the Conspiracy

1. The Effect of Estate Taxes

For a person who died in the year 2001, the laws and

regulations of the United States provides that any estate with a net value of more than $675,000.00 shall incur an estate tax. The computation of the tax is determined by a schedule which varies according to the size of any particular estate.

For a person dying with an estate in 2001 worth $100,000,000.00, the estate tax imposed on such an estate would roughly be $9,230,650.00 on the first $17,184,000.00 of the estate, plus 55% of amount from $17,184,000.00 to $100,000,000.00, or $45,548,800.00, producing a total federal estate tax liability of $54,779,450.00.

Many of the states of the United States impose separate and additional estate taxes. The State of New Hampshire in 2001 imposed an 18% estate tax on transfers of property at death. If the same person in the above hypothetical died in New Hampshire in the year 2001, then a possible state inheritance tax liability of roughly $18,000,000.00 might have been imposed under New Hampshire law.

Since the election of George W. Bush there have been many changes with respect to estate taxes, both at the federal and state level.

At the federal level, the estate tax will be phased out over a ten year period with its total elimination by year 2010.

Many states, like New Hampshire, have completely

repealed their inheritance tax laws. An estate for a person dying after January 1, 2003, in New Hampshire will incur no estate tax liability for the assets transferred at death.

With gradual disappearance of the federal and state estate tax provisions there are those in the industry providing services to the computation of such taxes, such as lawyers, accountants and appraisers, who believe that is acceptable to falsify information relating to estate tax returns which under existing law would create large tax liabilities.

2. The Formation of the Initial Enterprise and the Nature of its Conspiracy

On or about January 14, 2001, Carl G. Hogan, Sr., passed away at his New Hampshire residence leaving behind a substantial sized estate.

The Estate of Carl G. Hogan, Sr., was probated in the Cheshire County Probate Court at Keene, New Hampshire. Defendants, Carl G. Hogan, Jr., Brian J. Hogan and David Hogan were the co-executors of said estate, herein referred to as the "Hogan Brothers".

The Hogan Brothers sought the counsel of Paul Weil for preparation and filing of Federal Form 706, which is the Federal Estate Tax form used to report any such tax liability. Paul Weil at all times acted as the agent of Bryan Cave LLP, which is a law firm boasting more than 800 attorneys world wide.

In or around June of 2001, Paul Weil, Bryan Cave, through Weil, and the Hogan Brothers conspired to generate false state and federal estate tax returns for the Estate of Carl G. Hogan, Sr., by acquiring, inter alia, appraisals of estate assets containing false and fraudulent information and values. The conspiracy consisted of a scheme whereby Paul Weil and Bryan and Cave LLC, through Weil, would engage an appraisal firm for making certain appraisals of certain assets of the Estate of Carl G. Hogan, Sr. Weil and Bryan and Cave LLP, would then illegally and inappropriately interfere with the appraisal firm's ability to prepare accurate appraisals by providing said firm with false legal conclusions and information regarding matters affecting the values of certain assets. The scheme also provided that the Hogan Brothers would assist Paul Weil and Bryan Cave LLP in interfering with said appraisals by personally providing, or having the employees the Estate's companies provide agents of the appraisal firm false information about assets of the companies and/or the accounting records of said companies.

By forming the above said conspiracy, PAUL WEIL, BRYAN CAVE LLP, CARL G. HOGAN, JR., BRIAN J. HOGAN and DAVID HOGAN create and "Enterprise" whose fundamental goal was to illegally prepare and file federal and state estate tax returns. The Enterprise and conspiracy had the further purpose and scheme beyond the filing of such tax returns of misleading government officials and concealing information from them to prevent detection of their illegal activity. Included in the continuing scheme would be letters of opinion by Paul

Weil and Bryan Cave LLP to the appraisal firm to make any decision of value reduction by said firm look as if it were based on "strategy" by legal opinion, when in fact the underlying basis would be the illegal conduct of the attorneys. Further, it was contemplated that the issue of value might be litigated and that the Enterprise would have to take certain actions to continue to conceal from and deceive government officials as a result thereof.

3. Marshall and Stevens Incorporated Joins the Enterprise and Conspiracy

Soon after the initial Enterprise and conspiracy was made, the Enterprise retained Marshall & Stevens Incorporated to prepare appraisals of certain assets of the Estate of Carl G. Hogan, Sr.

The assets of the Estate of Carl G. Hogan, Sr., included, inter alia, the following businesses:

a) Hogan Services, Inc.;
b) Hogan Racing, LLC;
c) Hogan Real Estate Development Partnership;
d) Hogan Motor Leasing, Inc.; and
e) C & M Service, Inc.

Marshall & Stevens Incorporated agreed for a certain fee to prepare appraisals on the above referenced businesses of the Hogan Estate. The preparation of the those appraisals is referred to herein as the "Hogan File".

At the time the Hogan File began, the plaintiff, Keith McFarland, served as Appraisal Director in the St. Louis office of Marshall & Stevens Incorporated and his duties included reviewing reports by other appraisers in the office regarding the ethical and legal compliance of certain undertakings by the other appraisers in completing assignments. As such, the other appraisers would from time to time report to the plaintiff if he or she believed someone was attempting to procure a false or otherwise unethical determination of value in an appraisal.

Plaintiff was assigned to completing the appraisal of Hogan Real Estate Development Partnership. Other appraisers in his office were assigned work on the other four business listed above as being the Hogan File.

Prior to his issuing his first draft appraisal on or about July 23, 2001, the plaintiff received reports by the other appraisers working on the Hogan File that the attorneys (Paul Weil and others at Bryan Cave LLP) were asserting undue pressure on them to state false and fraudulent values in their appraisals. Undue pressure included false and misleading information being provided by said attorneys through telephone calls, emails, faxes, letters and in person conversations.

In early September the plaintiff received false communications by telephone from Paul Weil regarding a proposed bridge project which Weil believed would lower the value of the property for which the plaintiff was compiling an appraisal.

On or about July 23, 2001, the plaintiff submitted his draft appraisal of the Hogan Real Estate Development Partnership.

On or about September 3, 2001, the plaintiff was summoned to a conference room at M & S for a teleconference meeting with Paul Weil and some of the other appraisers working on the Hogan File. Present in the conference room were Ray Essma, a regional manager for M &S, and Steven Krekeler, senior appraiser at M & S., and Jared Renderer an associate appraiser at M & S. The conference was held with Paul Weil via speaker phone.

During said teleconference the Enterprise, through Paul Weil, attempted to influence the plaintiff's conclusions as to value by asserting false information regarding EPA issues involving certain real estate. The plaintiff opined that it would be illegal and unethical to use the suggested reduction in value ordered by Weil based on hypothetical EPA issues. The plaintiff refused to modify his appraisal based on such information and refused to participate in the Enterprise at which time the Enterprise, through Paul Weil, through acts of extortion, threatened to ruin plaintiff's career and lively hood by emailing every law firm in the St. Louis area and seeing to it that he would never work as an appraiser again if he didn't join the Enterprise, all in violation of 18 U.S.C. § 1951.

After said teleconference meeting, and based on information provided by Steven Krekeler and Jared

Renderer, the plaintiff concluded that the entire Hogan File have been illegally influenced and that it would be a felony for his firm to provided final appraisals based on the illegally influenced values that had been generated.

On at least two occasions on or about September 3 or 4, 2001, the plaintiff personally telephoned M & S's CEO in Los Angeles, Mark Santasario, and advised him that the Enterprise was attempting to commit fraud and that M & S should withdraw from the project.

M & S thereafter renegotiated its fee with the Enterprise and agreed to participate in the Enterprise and conspiracy by providing false appraisal values for the purpose of federal and state estate tax returns.

M & S, as a new member of the Enterprise, opined with the other members of the conspiracy that the plaintiff had become a problem in that he would not participate in the fraud. It was believed that he might even alert government officials regarding the scheme. It was therefore agreed that the Plaintiff would be removed from working on the Hogan File and later terminated after sufficient time had passed. Further it was agreed that all prior draft appraisals and file documents at M & S would have to be destroyed for which M & S would have to purchase a paper shredder.

On or about September 5, 2003, Paul Weil sent Steve Krekeler an email confirming that the two of them had agreed that M & S would provided sworn certification to Weil's office that all prior draft appraisals had been

destroyed. A copy of said email is attached hereto as Exhibit "A".

On or about September 21, 2001, Merle Atkins, Appraisal Vice President at M & S, emailed Steve Krekeler a letter attaching the plaintiff's original draft appraisal as amended by Paul Weil. This communication by Atkins illustrates that once the plaintiff was removed from the Hogan File, Paul Weil coerced a signature of someone other than plaintiff which Merle Atkins clearly states is a felony. A copy of said email is attached hereto as Exhibit "B" (Attachments omitted).

In September of 2001, M & S clearly joined and became a member of the Enterprise and conspiracy. Throughout the course of the Enterprise and conspiracy and to the present day, defendants have engaged in illegal and fraudulent acts knowingly and intentionally with a common purpose.

B. Defendants' Liability For Violations of The Racketeer Influenced and Corrupt Organizations Statute

In violation of 18 U.S.C. § 1962(d) defendants entered into conspiracies to violate 18 U.S.C. § 1962, subparagraph (c), and did in fact violate and continue to violate said statute, as more specifically set out herein.

Defendants, BRYAN CAVE, LLP, PAUL WEIL, MARSHALL & STEVENS INCORPORATED, CARL G.

HOGAN, JR., BRIAN J. HOGAN, and DAVID HOGAN, and others known and unknown, being persons employed by and associated with the Enterprise did unlawfully, knowingly, and intentionally conduct and participate, directly and indirectly, in the conduct, management, and operation of the affairs of the aforementioned Enterprise, which was engaged in, and the activities of which affected interstate and foreign commerce, through a pattern of racketeering activity consisting of numerous acts of racketeering, indictable under various statutes as further set out below, all in violation of 18 U.S.C. § 1962(c).

The racketeering activity contemplated and conducted by the Enterprise pursuant to said conspiracy included but was not limited to the activity set out below.

Through said employment with M & S, Plaintiff learned that the defendants were attempting to file false federal and state estate tax returns by intentionally understating the asset appraisal values by tens of millions of dollars. Upon information and belief by the plaintiff, the defendants did in fact file false federal and state estate tax returns thereby defrauding the United States and the State of New Hampshire, and the defendants continue to defraud the United States and the State of New Hampshire by failing and refusing to make proper amendments to said returns or otherwise report the illegal activity. A copy of the Inventory of Fiduciary is attached hereto as an exhibit labeled "REF: 0536" through "REF: 0543".

The defendants, in violation of 18 U.S.C. § 1957, sought to engage in monetary transactions involving criminally derived property in excess of $10,000.00, by dispersing funds from the Estate of Carl G. Hogan, Sr., to certain legatees knowing that said funds would be illegally acquired or retained due to the filing of a false federal and state estate tax returns.

Plaintiff refused to participate in the Enterprise at which time the enterprise, through Paul Weil, through acts of extortion threatened to ruin plaintiff's career and lively hood by emailing every law firm in the St. Louis area and seeing to it that he would never work as an appraiser again if he didn't join the tax fraud scheme, all in violation of 18 U.S.C. § 1951.

Plaintiff refused to participate in deriving false value conclusions and refused to sign or affix his signature to said appraisal which effectuated him being removed from working on the Hogan File by the enterprise and then later being terminated from employment with Marshall & Stevens Incorporated.

The acts committed by defendants as set out in the preceding two paragraphs above were committed in furtherance of the conspiracy and as a necessary component of the alleged conspiracy.

When the plaintiff refused to join conspiracy the defendants became concerned and worried, and believed the plaintiff would either tell law enforcement officials of the activity or would be asked by law enforcement

officials about the illegal activity.

On or about September 5, 2001, after plaintiff had been removed from the Hogan File, the enterprise through Paul Weil and Marshall & Stevens Incorporated agreed to destroy all prior appraisal drafts in violation of 18 U.S.C. § 1510 knowing the plaintiff was either likely to tell law enforcement officials about the illegal activity or otherwise be questioned by law enforcement officials about such activity (Exhibit "A").

On or about September 24, 2001, the enterprise through Paul Weil modified plaintiff's original appraisal draft in violation 18 U.S.C. § 1510, knowing the plaintiff was either likely to tell law enforcement officials about the illegal activity or otherwise be questioned by law enforcement officials about such activity. (Exhibit "B").

Contemplated in the conspiracy to violate 18 U.S.C. § 1962(c) was that the participants of the Enterprise would necessarily violate the 18 U.S.C. § 1341 mail fraud, and 18 U.S.C. § 1343 wire fraud provisions of law by utilization of the United States Postal Service and telephone/email communications to facilitate the scheme.

From July of 2001 to July of 2002 the enterprise did in fact transmit dozens of letters, telephone calls and emails through either the U.S. Postal Service or wire communication in interstate commerce, for the purpose of executing their conspiracy.

The transmittals referenced in the above preceding paragraph included but are not limited those matters set out as follows:

a) On or about September 5, 2001, Defendant, attorney Paul Weil, emailed Steve Krekeler of Defendant, Marshall & Stevens Incorporated, a communication wherein said attorney confirmed in writing that they had agreed to destroy all prior appraisal drafts. (Exhibit "A", also labeled as "REF: 0012".)

b) On or about August 21, 2001, Defendant, attorney Paul Weil, emailed Steve Krekeler of Defendant, Marshall & Stevens Incorporated, a communication wherein said attorney dictates reduction of values to the appraisal firm. (A copy of said email is attached hereto as an exhibit labeled as pages "REF: 0001" through "REF: 0004".)

c) On or about August 23, 2001, Defendant, attorney Paul Weil, emailed Steve Krekeler of Defendant, Marshall & Stevens Incorporated, a communication wherein said attorney dictates reduction of values to the appraisal firm. (A copy of said email is attached hereto as an exhibit labeled as pages "REF: 0005" through "REF: 0008".)

d) On or about August 23, 2001, Defendant, attorney Paul Weil, emailed Steve Krekeler of Defendant, Marshall & Stevens Incorporated, a communication wherein said attorney suggests

inappropriate reduction of values to the appraisal firm by way of said attorney's accountant's notes. (A copy of said email is attached hereto as an exhibit labeled as pages "REF: 00015" through "REF: 00017".)

e) On or about August 23, 2001, Defendant, attorney Paul Weil, emailed Steve Krekeler of Defendant, Marshall & Stevens Incorporated, a communication wherein said attorney dictates reduction of values to the appraisal firm. (A copy of said email is attached hereto as an exhibit labeled as pages "REF: 0018" through "REF: 0020".)

f) On or about September 12, 2001, Defendant, attorney Paul Weil, emailed Steve Krekeler hypothetical information regarding the Mississippi River Bridge project. (A copy of said email is attached hereto as an exhibit labeled "REF: 0033" through "REF: 0034".)

g) On or about September 7, 2001, Paul Weil emailed Steve Krekeler hypothetical information about bridge project to influence value reduction. (A copy of said email is attached hereto as an exhibit labeled "REF: 0035" through "REF: 0036").

h) On or about September 7, 2001, Paul Weil emailed Steve Krekeler hypothetical information about environmental hazards to influence value reduction. (A copy of said email is attached hereto as an exhibit labeled "REF: 0038").

i) On or about September 4, 2001, Steve Krekeler faxed David Hogan outlines showing how both the Report and Model could be changed per the information provided by Weil and the Hogan Brothers. (A copy of said fax is attached hereto as an exhibit and labeled "REF: 0485 through "REF: 492").

j) On or about September 15, 2001, Paul Weil emailed Steve Krekeler information regarding real estate values. (A copy of said email is attached hereto as an exhibit labeled "REF: 0497").

Upon information and belief the plaintiff alleges that the defendants, in violation of 18 U.S.C. § 1957, did in fact engage in monetary transactions in criminally derived property in excess of $10,000.00, by dispersing funds from the Estate of Carl G. Hogan, Sr., to certain legatees knowing that said funds were be illegally acquired. Said transactions began soon after the death of Carl G. Hogan, Sr., and continue to the date hereof.

As a result of aforesaid conspiracy to commit unlawful acts and the unlawful acts committed by defendants, plaintiff has been damaged in his business and property.

IV. PRAYER FOR RELIEF

WHEREFORE, the plaintiff, as against the defendants, BRYAN CAVE LLP, PAUL WEIL, MARSHALL & STEVENS, INC., CARL G. HOGAN, JR., BRIAN J. HOGAN, and DAVID HOGAN, respectfully requests this

Court to:

A. Grant a permanent injunction enjoining defendants, their officers, successors, assigns, and all persons in active concert or participation with them, from engaging in any unlawful activity which is the basis of this action.

B. Order defendants to make whole plaintiff by paying his loss of income and pre-judgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of the unlawful racketeering activity.

C. Order defendants to make whole the plaintiff by providing compensation for past and future pecuniary losses from the unlawful racketeering activities described herein.

D. Order defendants to make whole the plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful activities described herein, in an amount to be determined at trial.

E. Order defendants to pay the plaintiff triple damages as allowed by law.

F. Order defendants to pay the plaintiff punitive damages for their malicious and/or reckless conduct, in an amount to be determined at trial.

G. Grant such further and relief as the Court deems necessary and proper.

PLAINTIFF REQUESTS A TRIAL BY JURY.

COUNT II

TORTIOUS INTERFERENCE WITH CONTRACT

The Plaintiff, Keith McFarland, by and through his attorney, Daniel F. Goggin, for his complaint herein, alleges as follows:

NATURE OF ACTION

This action is also based on the common law of Illinois for tortuous interference with the contractual rights of the plaintiff.

I. JURISDICTION AND VENUE

Jurisdiction is invoked pursuant to 28 U.S.C. § 1367. This action is predicated on the common law of Illinois and supplemental jurisdiction is necessary.

II. PARTIES

Plaintiff, Keith McFarland, by and through his attorney Daniel F. Goggin, re-alleges and incorporates by reference in this Count the allegations contained in Section II of Count I of this Complaint, as if fully set forth herein.

III. STATEMENT OF CLAIM

Plaintiff, Keith McFarland, by and through his attorney Daniel F. Goggin, re-alleges and incorporates by reference in this Count the allegations contained in Count I of Section III of this Complaint, as if fully set forth herein.

At the time the conspiracy alleged herein was formulated the plaintiff had a contractual right of employment with the defendant, MARSHALL & STEVENS, INC.

The plaintiff had a reasonable expectation that his contractual right of employment with Marshall & Stevens, Inc., would continue.

The defendants, BRYAN CAVE, LLP, PAUL WEIL, CARL G. HOGAN, JR., BRIAN J. HOGAN and DAVID HOGAN (CAVE AND HOGAN herein), knew or should have known of the plaintiff's contractual right of employment with Marshall & Stevens, Inc.

CAVE and HOGAN tortiously interfered with the plaintiff's contract of employment with Marshall & Stevens, Inc., by convincing Marshall & Stevens, Inc., to alter the plaintiffs' job duties and ultimately terminating his employment.

CAVE and HOGAN effectuated the termination of plaintiff's employment with Marshall & Stevens, Inc., for their own benefit and profit as alleged herein in that

with the plaintiff's departure it would be more likely that CAVE and HOGAN would succeed in defrauding the United States in tax fraud.

MARSHALL & STEVENS, INC., acquiesced in CAVE and HOGAN's influence over it with respect to the plaintiff's termination, despite the fiduciary duty it had to deal with the plaintiff in good faith.

MARSHALL & STEVENS, INC., otherwise converted its fiduciary duty owed to the plaintiff to its own benefit.

All of the defendants received a benefit from the tortious interference with the plaintiff's employment right by sharing in the illegal revenue made possible by the plaintiff's termination.

The unlawful acts complained of above were committed willfully, intentionally and with callous and reckless disregard to the rights of plaintiffs.

IV. PRAYER FOR RELIEF

WHEREFORE, the plaintiff, as against the defendants, BRYAN CAVE LLP, PAUL WEIL, MARSHALL & STEVENS, INC., CARL G. HOGAN, JR., BRIAN J. HOGAN, and DAVID HOGAN, respectfully requests this Court to:

A. Grant a permanent injunction enjoining defendants, their officers, successors, assigns, and all persons in active concert or participation with them,

from engaging in any unlawful activity which is the basis of this action.

B. Order defendants to make whole plaintiff by paying his loss of income and pre-judgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of the tortious interference with the plaintiff's employment right.

C. Order defendants to make whole the plaintiff by providing compensation for past and future pecuniary losses from the wrongful activities described herein.

D. Order defendants to make whole the plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful activities described herein, in an amount to be determined at trial.

E. Order defendants to pay the plaintiff punitive damages for their malicious and/or reckless conduct as allowed by law, in an amount to be determined at trial.

F. Grant such further and relief as the Court deems necessary and proper.

PLAINTIFF REQUESTS A TRIAL BY JURY.

COUNT III

SLANDER OF CHARACTER

The Plaintiff, Keith McFarland, by and through his attorney, Daniel F. Goggin, for his complaint herein, alleges as follows:

NATURE OF ACTION

This action is based on the common law of Illinois for slander of character.

I. JURISDICTION AND VENUE

Jurisdiction is also invoked pursuant to 28 U.S.C. § 1367. This action is predicated on the common law of Illinois and supplemental jurisdiction is necessary.

II. PARTIES

Plaintiff, Keith McFarland is an individual citizen and protected by the laws of the United States.

At all relevant times the defendant, Bryan Cave LLP, has continuously been and is now a limited liability partnership doing business in the Southern District of Illinois

At all relevant times the defendant, Paul Weil, was an individual citizen acting as a fiduciary for the Estate of Carl G. Hogan, Sr, and as agent for the defendant, Bryan Cave LLP.

At all relevant times the defendant, Carl G. Hogan, Jr., was an individual citizen acting as a fiduciary for the

Estate of Carl G. Hogan, Sr.

At all relevant times the defendant, Brian J. Hogan, was an individual citizen acting as a fiduciary for the Estate of Carl G. Hogan, Sr.

At all relevant times the defendant, David Hogan, was an individual citizen acting as a fiduciary for the Estate of Carl G. Hogan, Sr.

III. STATEMENT OF CLAIM

Around or about June of 2001, Plaintiff, Keith McFarland, under the employ of Marshall & Stevens Incorporated (M & S herein) undertook an agreement with M & S whereby Plaintiff agreed to perform certain appraisal work and professional services for M & S.

M & S had been retained by the defendants, BRYAN CAVE LLP, PAUL WEIL, CARL G. HOGAN, JR., BRIAN J. HOGAN and DAVID HOGAN, to perform appraisals of assets belonging to the Estate of Carl G. Hogan, Sr.

Plaintiff, pursuant to said agreement and retention by the defendants, did perform said appraisal work and professional services, all of which was reasonable and complied with industry standards.

Despite the quality work and professionalism Plaintiff performed for the defendants, the defendants, through Paul Weil, repeatedly made communications to other parties that Plaintiff did not and cannot perform quality

work.

Defendants have made such slanderous statements with malice and intent to injure Plaintiff's business and property.

Plaintiff has and will be damaged by Defendants' slanderous statements.

Plaintiff has had to retain an attorney to bring this action against Defendants for their slanderous conduct and Defendants should pay for such attorney.

IV. PRAYER FOR RELIEF

WHEREFORE, the plaintiff, as against the defendants, BRYAN CAVE LLP, PAUL WEIL, CARL G. HOGAN, JR., BRIAN J. HOGAN, and DAVID HOGAN, respectfully requests this Court to:

A. Grant a permanent injunction enjoining defendants, their officers, successors, assigns, and all persons in active concert or participation with them, from engaging in any unlawful activity which is the basis of this action.

B. Order defendants to make whole the plaintiff by paying his loss of income and pre-judgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of the slanderous conduct by the defendants.

C. Order defendants to make whole the plaintiff by providing compensation for past and future pecuniary losses from the wrongful activities described herein.

D. Order defendants to make whole the plaintiff by providing compensation for past and future nonpecuniary losses resulting from the unlawful activities described herein, in an amount to be determined at trial.

E. Order defendants to pay the plaintiff punitive damages for their malicious and/or reckless conduct as allowed by law, in an amount to be determined at trial.

F. Grant such further and relief as the Court deems necessary and proper.

PLAINTIFF REQUESTS A TRIAL BY JURY.

Respectfully submitted,
KEITH MCFARLAND

S/ Daniel F. Goggin

Daniel F. Goggin , his attorney
Attorney at Law
P.O. Box 157, 204 W. Oak
Greenville, Illinois 62246
(618) 664-1399
Attorney # 06210814

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the following:

Russell Scott	Robert Schultz, Jr.
Emily Singley	Raymond Rose
Attorneys at Law	103 W. Vandalia St.,
12 Wolf Creek, Suite 100	Suite 100
Belleville, IL 62226	Edwardsville, IL 62025

by enclosing the same in an envelope addressed to such attorneys and by depositing said envelope in a U.S. Post Office box at Greenville, Illinois, on December 29, 2003.

s/Daniel F. Goggin

54a

AOL Mail

Subj: C&M Services
Date: Wed, 5 Sept 2001 4:16:01 PM Eastern Daylight Time
From: "Weil, Paul" <ppweil@BryanCave.com>
To: "Steve Krekeler (E-mail)" <Skrekele@Marshall-
CC: "Schaperkotter, John" <jdschaperkotter@BryanCave.com>

9/5/01 3:10 PM

Steve,

To confirm our conversations of today:

1. M & S will provide written, notarized certification of destruction of prior appraisal drafts.

2. Attached please find my spreadsheet re C & M Services.

3. We will meet in our offices tomorrow, 9/6/01 from 2:30 PM to 5:30 to discuss C&M and HML.

4. We will meet in our offices Friday, 9/7/01 from 9:30 PM to 5:30 to discuss Real Est, and remaining issues.

5. Paul

6. <<sm%702!.XLS>>

[Headers Omitted]
[AOL Mail]

(EXHIBIT "A")

Subj: Hogan Trucking
Date: 9/21/01 8:22:44 PM Central Daylight Time
From: Antman145@aol.com
To: Stlkrekeler!aol.com
CC: kmcfarla@marshall-stevens.com
File: Hoganrevant1.doc(247808 bytes) DL Time (TCP/IP):<1 minute

Steve:

Attached is the report which contains the changes you noted by the attorney. I have made a couple of additions which are needed in yellow. Deleting the unusual considerations from the letter of transmittal is technically a violation of ethics and USPAP; however, I think we have presented them within the report so as not to hide them from the reader.

In response to my signing the report, the attorney has a problem. He is asking me to commit a crime which under most state licensing requirements is a felony. Thus, I will not be signing the report. If he wants me to sign, I will have to inspect the property, all the comps, etc. The fee for this at my rate of $250 per hour will be about $5,000 plus expenses. Keith did the appraisal

and as the licensed appraiser in that jurisdiction needs to sign the report. I can sign as the reviewer. It is bad enough that the attorney has introduced hypothetical considerations into the report, now he wants to dictate who signs. If he has a problem with this, have him call me. My cell phone number is 215-280-6996.

Hopefully this will put an end to this since I have spent about a full day on it already.

Merle

[Headers Omitted]
[AOL Mail]

EXHIBIT "B"

Subj: Hogan Built-in Gains Memo
Date: Tue, 21 Aug 2001 12:08:09 PM Eastern Daylight Time
From: "Weil, Paul" <ppweil@BryanCave.com>
To: "Steve Krekeler (E-mail)" <Skrekele@Marshall-Stevens.com>
CC: "Schaperkotter, John" <jdschaperkotter@BryanCave.com>

8/21/01 11:05 AM

Steve,

Here is an electronic copy of the built-in gains memo.. I will bring hard copies of the cited cases for your files,

together with the other materials I have assembled, when we meet this afternoon.

I think we will be looking for in your next draft, at a minimum:

(a) a 20% (combined fed/state) discount component for this factor alone, which clearly leaves you a 20% or more margin (24% +2% tax effected {39% x 6%}), in addition to,

(b) the discounts for lack of merger, sale or liquidation control {66 2/3% required) ("Extraordinary Events");

(c) a discount for the condition of the trucking industry generally (100,000 used trucks in the market place at D/D, or a 3 year supply, as evidenced by the FED Beige Book dated 1/17/01, the Business Journal Article and the other materials I will deliver to you;

(d) an EBITDA multiple of not in excess of 4 (rather than 5) before discounting for the generally declining business at D/D, as also evidenced by the Beige Book and other materials you either have or we will have delivered to you. You will recall from our last meeting that the comparables EBITDA of 5 does not reflect the lower carrying cost of a Penske/GE Capital, Ryder, or UHaul who use the market place to raise capital. That factor alone should discount the comparables EBITDA by 20%, or more, since HML's cost of funds is 40% or more of the comparable's cost of funds.

In short, your last draft may have overstated the value of HML by at least 30% or more.

In addition, the lack of control discount must be raised from 5% (which only reflects the expense of disposition) to reflect (b) above to effect the real lack of control for everything except day to day operations, or "Management" as distinguished from "ownership" control of Extraordinary Events. As you know, the courts have accorded not less than a 20% discount for that factor alone. I will be delivering as part of our package, an explanation from current legal text of the voting percentages required for extraordinary events.

I am free between 2 and 4 today, if that time frame is convenient to you. Will be glad to walk to your office.

[Headers Omitted]

[REF: 0001]

---

cc: Weil, Paul
Subject: Revised TTM amounts

Paul,

I asked Geri Zinn, the Director of Accounting for Hogan Motor Leasing, Inc., to review the amounts for the trailing-twelve-month ("TTM") income that was provided to Marshall & Stevens for use in their valuation report. She has done this and has determined that the TTM amount is overstated approximately $300,000. Geri is

going to call Steve at Marshall & Stevens.

Additionally, I have attached a calculation of the estimated adjustment to the deferred tax liability shown on the balance sheet at December 31, 2000, as we discussed.

Lou
Louis W. Fields
Conner Ash, P.C.
(314) 205-2510
Fax (314 205-2505

CONFIDENTIALITY NOTICE: This e-mail and any attachments may contain confidential information. If you are not the named recipient, please notify us immediately at <mailto:mail@connerash.com> and delete the message without disclosing the contents to anyone, using them for any purposes or storing or copying the information in any medium.

<<deferred tax adjust.xls>> <<Mime.822>>

[Headers Omitted]

[REF: 0002]

HOGAN MOTOR LEASING, INC.
ESTIMATED ADJUSTMENT TO THE
DEFERRED INCOME TAX LIABILITY
JANUARY 14, 2001

	Books	Estimated Per Revised Adjustment	Amount
Deferred tax assets:			
Net Operating Loss	$ 6,442,309	$ (6,000,000)(1)	$ 442,309
Other	389,344		389,344
—	6,831,653	(6,000,000)	831,653
Deferred tax liability:			

Difference between the net book value of equipment on a federal income tax basis and the appraised value	17,595,809	1,687,764	19,283,573 (2)
Other	204,094		204,094
	17,799,903	1,687,764	19,487,657
Net deferred tax liability	$10,968,250	$ 7,687,764	$18,656,014

Notes:

(1) - Benefit would be reduced because of the change in ownership rules (assuming an unrelated buyer) that would significantly limit the ability to utilize these net operating loss carryover rules (estimate).

(2) - Estimated built-in-gain amount as per previous calculation

[REF: 0004]

AOL Mail

Subj: Market Value Approach Spreadsheet and Notes
Date: Thu, 23 Aug 2001 6:08:17 PM Eastern Daylight Time
From: "Weil, Paul" <ppweil@BryanCave.com>
To: "Steve Krekeler (E-Mail)" <Skrekele@Marshall-Stevens.com>
CC: "Schaperkotter, John" <jdschaperkotter@BryanCave.com>

8/23/01 5:00 PM

Steve,

I have attached an Excel spreadsheet (written in version 95) which displays my calculations of value using your method, but with discounts for size, as well as, limited customer base and lack of merger/sale control.

Please note the following:

(1) Unless you can point out errors of omission in the construction of the spreadsheet, the subject company has a substantial negative, rather than positive value. Should you be unable to point out those errors/omissions, the issuance of another draft appraisal report which reaches a different conclusion could have substantial consequences. We, of course, look forward to your perusal of the attached and your instruction of our use of your method in a

manner different than the spreadsheet displays.

(2) Please read the notes at the bottom of the spreadsheet first in order to understand both the points noted for the record and previously mentioned in meetings among you, the client, and their professional advisors and the method of spreadsheet construction and purpose.

(3) Columns D and E indicate a substantial negative, rather than positive, company value because they reflect, as we have previously discussed, several "off balance sheet" items. Your analysis method and any buyer/investor should and would make similar observations.

(4) Columns G and H reflect those reductions to the discounts to the EBITDA multiple necessary to produce any value.

(5) You have received by email other spreadsheets from Lou Field of Conner Ash and from me which:

(a) Compute built in gain and a legal memo from us which supports its deduction from value. Our spreadsheet reflects the deduction of its entire value, but note that if that value were converted for presentation purposes into an EBITDA discount that discount would fall squarely in the middle of the range outlined in our memo, after added state taxes, namely 20-22% out of a range of 9-27%;

(b) Compute the downward adjustments necessary to **[REF: 0005]** .the deferred tax assets display on the balance sheet for deferred tax liability arising out of the loss of net operating loss carrybacks which are currently booked ($6,000,000)';

(c) Display the upward adjustments necessary to deferred tax liabilities ($1.7 million) for built in gain. Your balance sheet computation and your income computations appear not to have been in sync.

[(c)] Trailing 12 month income overstatement of $300,000

(6) Positive working capital ($4,980,000 in your 7/23/01 draft) should be the subject of further discussion, since we believe its use cannot be substantiated at any level in this instance.

I will be out of town tomorrow and back in the office on Monday AM. I will plan to call you then to discuss this email and the attached.

Paul

<<sfbd03!.XLS>>

[Headers Omitted]

[REF: 0006]

Hogan ML Value1	Last Arch: 23 Aug 01 4:03 PM	23 Aug 01	11:52 PM	1326217v3
See SHEET 2 for Trend Line Analysis				
SHEET 1: Hogan Motor Leasing Revised Appraisal Values				

	37094					
	Draft					
	C	D	E	F	G	H

		Cum Method	Agg Meth		Cum Method	Agg Method
Market Multiple	5	5			5	
Less discounts for size	20%	10.00%	4.5		8.70%	4.57
Built in Gain	0%	0.00%	4.5	/3	0.00%	4.57
Limited Customer base	0%	10.00%	4.05		8.00%	4.2
Lack of merger/sale control	0%	10.00%	3.65		8.00%	3.86
Expense of Asset Disposition	0%	1.00%	3.61		1.00%	3.83

68a

Total Discounts	20%	31.00%			25.70%	
Net EBITDA Multiple	4	3.45	3.61		3.72	3.83
Adjusted pre-tax cash flow (EBITDA)	26126000	26126000	26126000		26126000	26126000
	104504000	90134700	94276977		97068000	99936596
Less adjustment for Market Approach	6504000					
	98000000					

Gross Value Non Operating Assets	14956000	14956000	14956000	/4	14956000	14956000
Death Benefits Receivable		0	0		0	0
Investment Securities		0	0		0	0
Hogan Racing Note Receivable		-2990000	-2990000	/5	-2990000	-2990000
Other Related Party Notes receivable		-1735000	-1735000	/6	-1735000	-1735000
Investments in untraded securities						

Fleet Wash Inc		-90000	-90000	/7	-90000	-90000
LLC		-26000	-26000	/8	-26000	-26000
Ameriquest		-10000	-10000	/9	-10000	-10000
Excess working capitol		-4980000	-4980000	/10	-4980000	-4980000
Plus Net Value Non Operating Assets		5125000	5125000		5125000	5125000
Total Operating Capital	112956000	95259700	99401977		102183090	105061596

Less::						
Fed/State Tax on Built-in Gain		-19283573	-19283573	/11	-19283573	-19283573
Long Term Debt	-85756000	-85756000	-85756000		-85756000	-85756000
New EBITDA Multiple Market Value	27200000	-9779873	-5637595		-2656483	22023
Notes:						
/1 Column G and H replicae Columns D and E, except they reflect the discounts to the EBITDA multiple necessary to produce any taxable value.						

/2 Columns E and H display the difference between use of the successive vs the cumulative method of discount application. Both are court approved..						
/3 Built in gain discounts is 20+% of product of any EBITDA multiple and adjusted pre-tax cash flow but is stated here as a whole # vs a discount.						
/4 7/23/01 Appraisal Draft failed to recognize facts noted in items 5-10 which reduce value of "non-operating assets".						
/5 Hogan Racing note under any scenario has a value of zero in the hands of HML, as has already been evidenced to you.						
/6 The interest rate on these notes is 6.5% or at least 50% of market rate. According, the notes have been discounted by 50%.						
/7 There is no ready market for or method of liquidating the Fleet Wash investment. Its value is therefore zero for practical purposes.						

/8 There is no ready market for or method of liquidating this LLC investment and therefore its value is zero for practical purposes						
/9 The Ameriquest Investment has been discounted by 10% or $10,000						
/10 We directly challenge the existence of any excess working capital. This business has none! We would caution against continued use of the item.						
/11 See note #3 above. This amount has been calculated by Conner Ash and you have been supplied with the calculation and a legal memo.						

[REF: 0007]

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Sheet 2

HoganMLValue1 Last Arch: 7 Aug 01 4:50 PM 23-Aug-01 11:52 PM 132617v 1

Trend Line Analysis

FYE	Total Assets	Standard Deviation	Growth		Equity	Projected equity as % of total asset;	Growth	
7/31/05	174,392,657	20,235,348	4.83%			17,251,622	9.89%	2.22%
7/31/04	166,354,939	17,518,274	5.96%			16,879,929	10.15%	2.38%
7/31/03	156,992,870	15,767,696	10.10%			16,486,942	10.50%	2.56%
7/31/02	142,588,190	24,004,706	10.06%			16,075,475	11.27%	2.75%
7/31/01	129,553,306	22,051,966	11.48%			15,645,452	12.08%	2.95%
12/31/00	116,207,794	21,883,881	-0.36%	-0.15%		15,196,920	13.08%	3.17%

7/31/00	116,631,036	16,742,364	15.85%	95.13%	14,730,072	12.63%	5.59%
7/31/99	100,670,134	7,926,058	21.51%	18.34%	13,949,893		16.78%
							0.068749
7/31/98	78,949,135		16.55%	16.55%	11,945,020		15.47%
07/31/97	67,739,996				10,344,501		

[REF: 008]

AOL MAIL

Subj: HML Revised TTM amounts and Deferred Tax Liab
Date: Thu, 23 Aug 2001 12:31:52 PM Eastern Daylight Time
From: "Weil, Paul" <ppweil@BryanCave.com>
To: "Steve Krekeler (E-Mail)" <Skrekele@Marshall-Stevens.com>
CC: "Schperkotter, John" <jdschaperkotter@BryanCave.com>

8/23/01 11:30 AM

Steve,

Here are Lou's note to me re: (1) Revised TTM amounts and (2) revised Fed Tax Liability comp which assumes, and you must, the loss of substantially all the NOL currently carried on the books as a deferred asset, for insert into your computations.

Also, and in addition, this will serve as a "heads UP" that my first cut at the discounts to EBITDA multiple, which would include the following

Size	10%
Built in Gain	18%
Limited Customer base	10%
Lack of merger/sale control	10%

Expense of Asset Disposition 1%

at very conservative percentages as a group produce a net EBITDA multiple of 2.55. Even if any one of the discounts is off by a point or two, the built in gain discount is way too conservative and would take up any slack, an then some. I have not yet made the successive (vs aggregate) discount computation, but will do so today. (I think the courts would approve my discount in this range plus 5%).

Now that I have had more time to think about and study your computation, I am convinced that any EBITDA multiple above 3 is grossly in error. No buyer would pay that amount, essentially because there are, as you have now recognized, a significant number of off balance sheet "liabilities." In fact, were I counseling a buyer, I'm not sure I would pay very much for this company (since some of my computations show a negative value).

I will be out of town tomorrow, but will call you on Monday to see what progress has been made.
Paul

-------Original Message------

From: "Louis Fields" <1fields@connerash.com
Sent: Wednesday, August 22, 2001 5:20 PM
To: Weil, Paul
CC: Revised TTM amounts **[REF: 0015]**

Geri Zinn, the Director of Accounting for Hogan

Motor Leasing, Inc., review the amounts for the trailing-twelve-month ("TTM") income that was forwarded to Marshall & Stevens for use in their valuation report. She has done this and has determined that the TTM amount is overstated approximately $300,000 Geri is going to call Steve at Marshall & Stevens.

Additionally, I have attached a calculation of the estimated adjustment to deferred tax liability shown on the balance sheet at December 21, 2000. As discussed.

Lou W. Fields
Conner Ash, P. C.
[Headers Omitted]

[REF: 0016]

HOGAN MOTOR LEASING, INC.
ESTIMATED ADJUSTMENT TO THE
DEFERRED INCOME TAX LIABILITY
JANUARY 14, 2001

	Per Books	Adjustment	Estimated Revised Amount
Deferred tax assets:			
Net operating loss	$ 6,442,309	$ (6,000,000) (1)	$ 442,309
Other	389,344		389,344

6,831,653	(6,000,000)	831,653

Deferred tax liability:
Difference between the net book value of equipment on a federal income tax basis and the appraised value.
Other

17,595,809	1,687,764	19,283,573 (2)
204,094		204,094
17,799,903	1,687,764	19,487,667

Net deferred tax liability

$ 10,968,250	$ 7,687,764	$ 18,656,014

Notes:

(1) - Benefit would be reduced because of the change in ownership rules (assuming an unrelated buyer) that would significantly limit the ability to utilize these net operating loss carryover rules (estimate).

(2) - Estimated built-in-gain amount as per previous calculation

deferred tax adjust Sheet 1 8/23/01 11:49 PM

[REF: 0018]

AOL Mail

Subj: Mississippi Bridge Impact on Real Property
Date: Wed, 12 Sept 2001 2:31:16 PM Eastern Daylight Time
From: "Weil, Paul" <ppweil@BryanCave.com>
To: "Steve Krekeler (E-Mail)" <Skrekele@Marshall-
CC: "Schaperkotter, John" <jdschaperkotter@BryanCave.com>

9/12/01 1:30 PM

Steve,

To confirm our telephone conversation of this date, I am sending to you by Access Courier this afternoon a package of information for M & S's file relating to the proposed new Mississippi river bridge. I will require, in view of the prior conduct of McFarland, that he state in his appraisal that he has reviewed the material assembled by Hogan and transmitted to you by me on this date.

I specifically call to his attention the following from the information packet forwarded to you today:

(1) Impact on subject property was a matter of public record as early as the Illinois DOT survey in September 1997.

(2) Property owner advised as early as February 7, 2000 that City of St. Louis had assigned on Michale Konroy of St. Louis Development Corporation (the "SLDC") the responsibility of working with the impacted businesses.

(3) Property owner advised by SLDC as early as June 28, 2000 that the party had been assigned "Estimated Partial Business Property Acquisition in Missouri" #M37.

(4) Property owner advised as early as June 28, 2000 in a communication from SLCD that:

"Vacating Thirteenth between Biddle and Carr could yield additional right-of-way for the partial taking at the Hogan Trucking facility; its truck access might be moved to Thirteenth and Biddle or to Cole."

(5) On December 8, 2000 HML communicated to SLDC that:

(A) Truck fuel island oriented for entrance from [**REP: 0033**] west to east from 14th St and that it was not practical to enter from either Carr or Biddle;

(B) Corporate offices configuration assumes customer entrance from 14th St.;

(C) 24 hour guard house and its communications would have to be relocated;

(D) Neither Biddle nor Carr are wide enough to support safe operations of large tractor/trailers moving concurrently in both directions;

(E) Northwest corner of H complex now houses two vital functions (which would be the subject of the taking), maintenance management and a training room and would have to be relocated to currently unavailable space.

(6) November 30, 2000 memo from P. Bowen to B. Hogan that timeline forecast on construction commencement in 2004 with property impact in 2005-7 period.

(7) Sketch illustrating property exchange proposed by SLDC and inadequacy of Carr and Biddle as entrances or exits.

[Headers Omitted]

[REF: 0034

AOL Mail

Subj: New Mississippi River Bridge
Date: Fri, 7 Sept 2001 4:51:40 PM Eastern Daylight Time
From: "Weil, Paul" <ppweil@BryanCave.com>
To: "Steve Krekeler (E-mail)" <Skrekel@Marshall-
CC: "Schaperkotter, John" <jdschaperkotter@BryanCave.com>

83a

9/7/01 3:42 PM

Steve,

Here is the URL for the new bridge. Perhaps you explain what an "URL" is to and could show K.M. McFarland how to use one:

http://www.newriverbridge.org/1a6_interchange.htm

That the URL exists is a fact. That there is information at that location on the WEB is a fact. That McFarland had not accessed it before he wrote his appraisal draft is a fact. That he questioned the existence of whole subject is a fact. All of these facts have by this email be noted in our records.

I would hope that his next draft takes due note of the facts displayed in the material being faxed to you, the material located at the above site, and the material which our library staff is further collecting and which will be delivered to you for your files either today or Monday.

I am faxing harding copy of this and other sites for your files.

Paul

[Headers Omitted]

[REF: 0035]

New Mississippi River Bridge Project

Connecting Missouri and Illinois to Downtown St. Louis

Project Overview - Maps

Project Maps
Project Time Line
Project Team

The new bridge is one part of a major transportation improvement program to provide additional capacity and keep traffic moving.

Relocation of Illinois 3
Relocation of I-70 (three proposals)
I-64 Connector to I-70
Reconstruction of Interchange

(Picture of Map)

New Mississippi River Bridge
New I-70 MO Interchange
Reconstruction at Poplar St. Bridge

Illinois Department of Transportation

[Headers Omitted]

[REF: 37]

9/7/01 2:15 PM

Re: Hogan Appraisal
Environmental Cost Estimate

Steve,

Pursuant to our conference of this morning among me, you, Essman and Sutherland wherein you requested that we furnish the current market range of costs for environmental investigation and remediation were any environmental hazards to exist on an approximate one acre site located in the City of St. Louis and utilized for the purposes of the subject property, we advise that the current St. Louis range of market prices are as follows:

PHASE	NON LEGAL COST RANGE	LEGAL COST RANGE	SERVICE DESCRIP
I	$3,000-$5,000	$1,000	Investigatory: Property utilization history FPA DNR public records
II	$10,000-$25,000	$2,000-$3,000	Core Drilling
III			Source (e.g.) LUST removal; contaminated soil removal; soil &

surface replacement

$50,000-$100,000 $10,000-$15,000

I have been further advised by my partners engaged in the environmental and real estate practices, that there are no circumstances in their practice experience where Phase III costs within the range noted above are not part of negotiations between a willing buyer and a willing seller of similarity used real estate.

Bryan Cave LLP

Paul P. Weil

[Headers Omitted]

[REF: 0038]

FACSIMILE TRANSMITTAL

[From] David Hogan

[To] Steve Krekel

Comments:
David - Re: Valuation Proj

[REF: 0485]

Tuesday, September 04, 2001

HOGAN MOTOR LEASING
11-REPORT CHANGES AT 8/23/01

HOGAN MOTOR LEASING - #1

Business Review Section

Description of Company
- Include discussion of specific aspects of the firm

Competition
- Competitors can drive Hogan out of any market whenever they choose to enter a lower tier (eg. Mom and Pop) of customer base. Similarly, if a competitor wanted Sav-A-Lot, Hogan could ultimately not price-compete.

Economic Outlook Section

Regional Outlook
- Include Excerpts from the Federal Reserve-Eight District-St. Louis
- What are the district's geographic boundaries and how do they compare to Hogan's areas of operations?

National Outlook
- May want to scale back
- Stay with what we have

Summary
- Review

Industry Outlook

Central Message

- Tie the industry outlook back into the market and income analysis
- Document the current negative situation in the trucking industry, trucking firms have been going out of business; HML's largest customer is a shakey business
- Document the collapse of the used truck market
- Central message of post-dated articles-the outlook actually got worse, subsequent to date of death

Macro-Trends

1. Transportation industry is in a decline due to slowing economy, rising fuel prices and glut of truck inventory
2. Fuel prices have hit carriers
3. Glut of inventory of trucks on the market' used truck market is soft.

Federal Reserve District-Second District-NY

- Include Paragraph-1/17/01 Beige book

Industry Articles

- Automotive Digest-10/10/00
- The Business Journal-6/11/01
- Stark's Research Outlook Reports **[REF:0486]**
- USA Today-6/20/01
- CNET.com-7/31/01-Havistar
- St. Louis Business Journal-8/7/01

Financial Analysis

Central Message

- Tie the financial status of Hogan Motors back to the market and income analysis

Adjustments to Financial Statements

- Discuss any adjustments to the historical financials

Financial Position

- Discuss extent of fixed assets and leverage[3]
- Solvency discussion; Z Factor

Trend in Working Capital

-

Trend in Assets and Equity

- There was no growth in assets in the latest fiscal year

Review of Operating Results

- Trend in margins

Historical Revenue and Margin Performance

- Revenue increased at a decreasing rate in the latest fiscal year

Overall Summary of Financial Condition

- Trend in sales
- Profitability
- Efficiency
- Liquidity
- Solvency

Appraisal Procedures

Discuss of Nonoperating Assets

1. Death benefit receivable
2. MO State Bank Stock
3. Note Receivable-due from Hogan Racing
4. Note Receivable-related party
5. Investment in untraded securities
6. Excess working capital
7. Built in gain-revenue equipment

Cost Approach

Revised Narrative and Footnotes to Exhibits

1. Discuss Hogan racing note

- Review market value of the fleet-glut of inventory at date of death. Needs to be reflected in fleet valuation; the market can only absorb about 50,000 new trucks-there were 100,000 trucks in the market at date of death. Used truck inventory was too high.

Market Approach **[REF: 0487]**

EBITDA Buildup

- Discuss cash value of life insurance adjustment

Guideline Companies

- See separate document

Time Periods of Market Multiples Applied to Subject

Company

- See revised TTM Computation

Control Premium

- Discuss any revisions

Market Multiples to Apply to Subject

-

Size Discount

- See separate document

Correlation and weighting of indications

- Discuss the reduced weighting on TTM EBITDA indication

Income Approach

Update narrative as needed

Description of DCF Assumptions

- Other income-change report language

Correlation of Results

Valuation Discounts

- Lack of extraordinary event control
  - See estate of Dunn write-up
- Lack of marketability (include transaction costs)
  - See Lantern report (maybe)
- Built-in gain discount
  - Valuation Strategies article-favors using

discount only in NAV approach, not earnings approach

Discount for Lack of Control

- The subject block held management control but not extraordinary event control
- Under MO corporate law-66% voting control required

HOGAN SERVICES - #2 (MGMT and Admin. Services)

Market Approach

- Exhibit A-restate the balance sheet; adjusted book value is about $695,000
- EBITDA Buildup-exclude Hogan Racing from Exhibit D-($75k)?
- Guideline Companies-drop Volt; expand discussion
- Time periods of market multiples applied to subject company
- Control Premium
- Market Multiplies to Apply to subject EBITDA
- Size Discount-increase
- Correlation and weightings of indications-$300k of EBITDA at a 3 multiple - $900,000-MV Invested Operating Capital **[REF: 0488]**

Income Approach

- Need to exclude Hogan Racing revenues and profits from projections

Nonoperating Assets

- 50% ownership interest in real estate partnership-add $344,000
- Death benefits receivable-add $177,000
- Note Receivable-Due from Hogan Racing-reduce to zero
- Working Capital Deficit-reduce by $906,000
- MV Invested Capital- $515
- Control Value of Equity-ditto

C&M SERVICES-#3 (Reparing and Maintaining Trucking Equipment)

Market Approach

- EBITDA Buildup
- Guideline Companies-drop Volt; expand discussion
- Time periods of market multiples applied to subject company
- Control Premium
- Market Multiples to Apply to Subject EBITDA
- Size Discount-increase
- Correlation and weightings of indications-$100k of EBITDA at a 3 multiple- $300,000-MV Invested Operating Capital

Income Approach

- Review

Nonoperating Assets

- None

HOGAN RAACNG-#4

CART Stock

- Paul will advise on availability of built in gain discount on CART stock held in LLC-none available

Debt Obligations

- Leave up

HOGAN REAL ESTATE DEVELOPMENT PARTNERSHIP-#5

Market Value of Real Estate

- Current valuation is $1mm
- Target valuation is $800k

[REF: 0489]

Tuesday, September 04, 2001

HOGAN MOTOR LEASING
15-MODEL CHANGES AT 8/23/01

HOGAN MOTOR LEASING - #1

Market Approach

EBITDA Buildup

- TTM EBITDA - client has provided new financial statements for the computation (lowering TTM EBITDA)

- Cash value of life insurance - CPA is suggesting that $30,000 of income be excluded from EBITTDA

Selection of Guideline Companies

- Selected multiples were RLC, R, and XTR
- Excluded UHAL multiple from selected multiple

Time periods of Market multiples Applies to Subject Company

- Law firm is suggesting that weighting on TTM EBITDA indication be reduced to reflect aberration

Control Premium

- Law firm and CPA firm suggesting that 30% control premium be reduced.

Size Discount

- Increased to 30% from 20%

<u>Cost Approach</u>

Hogan Racing Note

- Law firm has advised that note has no economic value; related party debtor is insolvent

Fleet Valuation

- 5% downward adjustment to M&E value
- Law firm is suggesting that the fleet valuation be reduced in light of glut of truck inventory on the market at the valuation date

Inicome Approahc

Correlation

Weightings

- Law firm is suggesting that cost approach be weighted

Non-operating Assets

Built in Gain-Fleet assets

- Law firm suggesting that enterprise value be reduced for built in gain on fleet assets. Built in gain is $50mm at 20% tax rate=$10mm enterprise value reduction

MO State Bank Stock - 75,000 Shares

- Reduced value by built-in gain
- Law firm suggesting that market value of stock be reduced for built in capital gain

Note Receivable-Due from Hogan Racing

- M&S needs to compute value. For now, the model reflects number provided by the law firm.

[REF: 0490]

- Obtain Note Agreements from client.
- Law firm has advised that note has no economic value; related party debtor is insolvent

Notes Receivable-Related Party

- Law firm suggesting that related party note be

repriced using market rate of interest

Excess Working Capital

- Increased WC% to 19% to zero out excess working capital.
- Law firm suggesting that excess working capital be adjusted to zero

Investment in Untraded Securities

1. Ameriquests investments discounted at 10% to carrying value of $90,000
2. Other untraded investments are valued at $0 due to lack of marketability.

No Changes

- Death benefit receivable

Other Levels of Value

- Control Value of Total Invested Capital
- Less: Outstanding Debt
- Control Value of Equity, prior to lack of marketability discount

Discount for lack of total control

- Used 15% lack of total control discount.
- Law firm is suggesting that lack of control discount be increased from 5% to 20% to reflect that the 53% voting block held only management control and not extraordinary event control.

<u>HOGAN SERVICES - #2(Mgmt and Admin. Services)</u>

Market Approach

- Exhibit A - restate the balance sheet; adjusted book value is about $695,000
- EBITDA Buildup exclude Hogan Racing from Exhibit D - ($75k)?
- Guideline Companies-drop Volt
- Time periods of market multiples applied to subject company
- Control Premium
- Market Multiples to Apply to Subject EBITDA
- Size Discount-increase
- Correlation and weightings of indications - $300lk of EBITDA at a 3 multiple - $900,000 - MV Invested Operating Capital

Income approach

- Need to exclude Hogan Racing revenues and profits from projections

Nonoperating Assets

- 50% ownership interest in real estate partnership - add $344,000
- Death benefit receivable - add $177,000
- Note Receivable - Due from Hogan Racing - reduce to zero
- Working Capital Deficit - reduce by $906,000
- MV Invested Capital - $515
- Control Valu eof Equity - ditto

<u>C & M SERVICES - #3 (Reparing and Maintaining Trucking Equipment)</u>

Market Approach **[REF: 491]**

- EBITDA Buildup
- Guideline Companies - drop Volt
- Time periods of market multiples applied to subject company
- Control Premium
- Market Multiples to Apply to Subject EBITDA
- Size Discount - increase
- Correlation and weightings of indications - $100k of EBITDA at a 3 multiple - $300,000-MV Invested Operating Capital

Income approach

- Review

Nonoperating Assets

- None

HOGAN RACING - #4

Debt Obligations

- Law firm has advised to continue to reflect debt obligations. No economic value was assigned to note receivables in Hogan Motor Leasing or Hogan Services.

HOGAN REAL ESTATE DEVELOPMENT PARTNERSHIP - #5

Market Value of Real Estate

- Current valuation is $1mm

100a

- Law firm is suggesting a real estate valuation of $800,000, based on the impact of future bridge construction and potential environmental issues from pumping fuel at the property.

[REF: 0491]

FACSIMILE TRANSMITTAL

9/15/01

[To]
Paul Weil

[From]
Steve Krekel

re: Hogan Real Estate Valu

Here are updated worksheets for Hogan Real Estate

Development Partnership and Hogan Services. Both reflect the revised real estate value of $880,000 for the Hogan Truck Service company.

I will deliver a draft report of the real estate valuation, for your review, when we meet Wednesday morning. I learned today that the real estate group is continuing to finalize the report and a draft will be available Wednesday.

Steve

[Headers Omitted]

[REF: 0497]

THE STATE OF NEW HAMPSHIRE

Cheshire County . Probate Court

The Estate of Carl G. Hogan
Docket Number 2001-0087
Date of Appointment March 13, 2001

INVENTORY OF FIDUCIARY

x Original ☐ Amended (Attach written explanation.)

Fiduciary Name:	Carl G. Hogan, Jr.
Fiduciary Name:	David A. Hogan
Fiduciary Name:	Brian J. Hogan
Capacity:	Co-Executors
Attorney Name:	David M. Tower

Court-appointed appraiser: John D. Schaperkotter

BOND AMOUNT ORDERED BY COURT $1,520,000.00

ESTATE SUMMARY

TOTAL VALUE OF REAL ESTATE

Attachment 1 . . . . . None

(Attach a listing (Attachment 1) which includes street address, city/town where real estate if located, county where deed is recorded, book and page of deed, and the value of each piece of real estate.)

TOTAL VALUE OF PERSONAL ESTATE (from total on second page) $1,520,152.98

TOTAL VALUE OF ENTIRE ESTATE
(Add A and B above) $1,520,152.98

Examined and accepted by court,

Date: September 18, 2001/cont to October 30, 2001

s/ Albert H. Weeks
Judge Alvert H. Weeks, Judge

PERSONAL ESTATE DETAIL

(Enter the total value of the personal property for each

category below, and list the specific items and their value for each category on the appropriate attachment. For decedent estates, values should be as of the date of death.)

CASH ON HAND ..... None

HOUSEHOLD FURNISHINGS AND EFFECTS
Attachment 2 ..... $ 26,485.00

(Items are listed in a separate appraisal, enter total value and attach a copy of the appraisal to Attachment 2. Do not list wearing apparel, Bibles, family pictures, photographs, other personal trinkets of sentimental rather than intrinsic value.)

OTHER TANGIBLE PERSONAL PROPERTY
Attachment 3 ..... None

(Attachment 3, list all other tangible personal property including motor vehicles, Utensils, mechanics tools and livestock. For each motor vehicle, list the year, make, model and vehicle identification number (VIN). If items are listed in a separate appraisal, enter the total value and attach a copy of the appraisal to Attachment 3)

STOCKS AND BONDS
Attachment 4 ..... $ 1,452,854.79

(Attachment 4, list stock or bond name, number of shares and value per share.) **[REF: 0536]**

BANK ACCOUNTS
Attachment 5 . . . . . $ 40,813.19

(Attachment 5, list the name and address of the bank or financial institution, the account certificate number, the date of the last interest/dividend and the account balance.)

BUSINESS ASSETS
Attachment 6 . . . . . None

NOTES RECEIVABLE AND OTHER WRITTEN EVIDENCE OF DEBT OWED TO THE DECEASED OR WARD .
Attachment 7 . . . . . None

(Attachment 7, list debtor and/or payor, date of note and terms of payment.)

OTHER MISCELLANEOUS PERSONAL PROPERTY
Attachment 8 . . . . . None

(Attachment 8, list any personal property not listed above and the individual values.)

TOTAL VALUE OF PERSONAL ESTATE
. . . . . $ 1,520,152.98

STATE OF MISSOURI

St. Louis City Date: 8-30-01

John D. Schaperkotter, the appraiser of the estate of

Carl G. Hogan, swear that I have acted faithfully, impartially and according to my best judgement.

s/ John D. Schaperkotter

Subscribed and sworn to before me, Notary Commission Expires 8-14-2004. Affix Seal

[AFFIXED SEAL] s/ Bonnie M. Rennter

STATE OF MISSOURI

St. Louis City Date: 8-30-01

Carl G. Hogan, Jr., David A. Hogan, Brian J. Hogan, the fiduciary of the estate of Carl G. Hogan, swear that I have shown the appraiser the total estate of the ward/deceased of which I have knowledge or possession. I further swear that I have knowledge or possession of any further estate of the ward/deceased, I will immediately amend my inventory.

s/ Carl G. Hogan, Jr.
Fiduciary

s/ David A. Hogan
Fiduciary

s/ Brian J. Hogan
Fiduciary

Subscribed and sworn to before me, My Commission

Expires _____

(AFFIXED SEAL OF NOTARY)

s/ James M. Piasecki

Notary Public/Justice of the Peace

A CERTIFICATION PURSUANT TO PROBATE COURT RULE 3 MUST BE FILED WITH THIS INVENTORY

ATTENTION BENEFICIALLY INTERESTED PARTIES

This inventory may be approved by the probate court unless a written objection, containing the specific factual or legal basis for the objection, is filed within 10 days after the date the Inventory is filed in the probate court. Failure to file an objection may forfeit your right to a hearing concerning the Inventory or your objection, and the probate court may then act without a hearing or any further notice to you.

[REF: -537]

The Cobbs
Antiques and Auctioneers

Bought - Sold Appraised - Auctioned

August 10, 2001

Dave M. Tower
Tower, Crocker & Mullins Attorneys at Law
47 Main Street, P.O Box 510
Jaffrey, NY 03452-1510

Reference: Estate of Carl G. Hogan located at 46 Woodbound Rd., Ridge, NH

Dear Mr. Tower,

After careful visual inspection, I do find the market value of the times listed below to be as indicated to the right of each description:

Porch

1	Wicker furniture: settee, 2 armchairs and table	$375
2.	WI table w/4 chairs and 2 side tables	$120
3.	Pickled pine serpentine front chest	$175
4.	2 paintings by Sybil Goldsmith	$150
5.	Miscellaneous small items - TV, etc.	$100

Living Room

6.	Hunt screen, 4 panel, new	$300
7.	New cupboard with painted scenes	$175
8.	Camel back sofa with carving	$450
9.	English club sofa with matching upholstery	$400
10.	Upholstered foot stool coach table	$175
11.	Upholstered swing chair with molded legs	$250
12.	10 drawer tall chest	$100
13.	Pair of upholstered club chairs	$350

14. Oval top glass bear table $125
15. Mahogany Empre style center table $250
16. Leaded glass and other lamps $500
17. Prints, modern paintings, etc. $375
18. Tasha Tudor print - garden, people, dogs . . $ 70
19. Miscellaneous smalls, etc. $500
20. Round floral rug $200

Dining Room

21. Set of 8 mahogany Queen Ann style dining chairs $700
22. Queen Ann style mahogany hunt board$350
23. Modern items on the hunt board $150

[REF: 0538]

24. Standing modern leaded glass lamp $300
25. Pair of upholstered armchairs $225
26. Oval hooked rug with game birds and wild flowers $500
27. Staffordshire lamp $250
28. 2 new small cupboards, tray table, and side table $325
29. Miscellaneous small animals, mirrors, lamps, etc. $325

TV room & ½ bath

30. Swede upholstered Queen Ann sofa $800
31. Pair of Chippendale style upholstered wing chairs $750
32. JVC large screen TV and VCR and cabinet $300
33. Collection of 19 modern bronzes, most are copies of important artists $2,100

34. 19th century kero angle lamp $125
35. Group of modern prints, mirrors, etc. $600
36. Stereo system $300
37. Knee hole desk and chair $150
38. Large needlepoint style rug plus 3 scatter rugs $200
38. Miscellaneous small pieces of furniture, lamps $160
40. Miscellaneous small items, books, photos, etc. $200
41. Baccarat and other glass $150

Front hall

42. Antique paint decorated Hitchcock child's chair $175
43. Paintings, canes, small wine table, etc. $100
44. Large harbor print $100
45. Beveled glass mirror with hunt scene $200

Master bedroom

46. Cherry wardrobe and wide dresser $350
47. Mahogany knee hole desk $120
48. Pickled pine armchair and a pair of side tables $300
49. 2 modern mirrors $200
50. Modern paintings $225
51. Bose radio and Phillips TV $200
52. Miscellaneous small items, hooked rugs, etc. $225
53. Brass style bed $100

Office

54. Compaq computer, printer, fax $300
55. Ash desk and chair $200
56. Oak Credenza $200
57. Prints, photos, watercolors, etc. $125

[REF: 0539]

58. Upholstered armchair and ottoman $100
59. Oak file cabinet and TV $150
60. Miscellaneous lamps, doorstops, etc. ..... $ 50

2nd Master bedroom

61. Cherry chest with cupboard and mirror $250
62. Pair of lamp cabinets $175
63. Upholstered king-size bed $200
64. Upholstered chair with ottoman $150
65. Cheery tall chest $125
66. JVC TV and VCR $250
67. Brass tray table, blue lamp, other lamps $120
68. Miscellaneous hooked rugs, pottery figures, etc. $100

Kitchen

69. Royal Dalton collection (12 figures) $2,000
70. Large collection of new china and quality glass $500
71. Modern appliances, cookware, etc. (not a part of the house) $300
72. Modern roll-top desk and chair $250
73. Kitchen table, 4 chairs and pine cabinet ... $180
74. Wicker and metal bakers type shelves $100
75. Miscellaneous small items:

cookbooks, photos, etc $100
76. WI table, chairs, lounge chairs, etc. $400

Ball ell
77. Refrigerator, 2 freezers $100

Apartment
78. Misc. furniture, pcitures, lamps, etc. $720

Guest house
79. Dining table and 4 chairs $125
80. Painted new hutch $150
81. Prints and wall hangings $125
82. Living room sofa and chair $250
83. Coffee table made from a sign $200
84. TV and VCR, etc. . . . . $ 75
85. 2 braided rugs $100
86. Small tables, lamps, etc. $200
87. Misc. small decorative items $100
88. Prints, photos, all framed $120
89. Modern bedroom furniture (4 rooms) $1,000

[REF: 0540]

90. Modern accessories, rugs, etc. $250
91. Refrigerator and other kitchen items $250

Total $26,485.00

Thank you,

Charles M. Cobb (signature)

Charles M. Cobb

[REF: 0541]

THE ESTATE OF CARL G. HOGAN
DOCKET NUMBER: 2001-0087

STOCKS AND BONDS
~~ATT~~ACHMENT 4:

Allmerica Financial Corporation			
1,159 Shares	59.50000	$	68,960.50
At&t Corporation			
Wireless Group			
400 Shares	24.390625	$	9,758.25
Union Planters Corporation			
19,937 Shares	36.812500	$	733,930.81

The following assets are held in a Merrill Lynch Account which are pledged as collateral for an underlying debt at Lloyds of London and not available to the Decedent's Estate:

At&t Corporation			
Wireless Group			
300 Shares	24.390625	$	7,317.19
Avaya, Inc.			
129 Shares	15.531250	$	2,003.53

Championship Auto Racing Team			
2,000 Shares	20.312500	$	40,625.00
Goodyear Tire & Rubber Company			
4,000 Shares	23.430000	$	93,720.00
International Business Machines			
465 Shares	93.656250	$	43,550.16
Lucent Technologies, Inc.			
1,550 Shares	18.390625	$	28,505.47
Pfizer, Inc			
2,600 Shares	41.421875	$	107,690.88
Union Planters Corporation			
4,591 Shares	36.812500	$	169,006.19
Verizon Communications			
2,700 Shares	54.734375	$	147,782.81

[REF: 0542]

DEPOSITED IN BANKS/FINANCIAL INSTITUTIONS
ATTACHMENT 5

Missouri State Bank
100 South 4th Street

St. Louis, MO 63102 Personal Checking
Account Number: 5125786
Non-Interest Bearing
Account Balance $ 28,743.10

Merrill Lynch
P. O. Box 2169
Morristown, New Jersey 07962-9825

Cash/Money Account
Account Number: 825-45T82
Last Dividend Paid 1/10/01
Account Balance $ 4,584.59

Merrill Lynch
3rd Floor Chester Street
London SW1X 7XD United Kingdom

CMA Money Fund
Account Number: 16M-10179
Last Dividend Paid 12/31/00
Account Balance: $ 2,352.63

A.G. Edwards & Sons, Inc.
One North Jefferson
St. Louis, Missouri 63103

Centennial Government Trust
Account Number: 260-287230-016
Last Dividend Paid 12/31/00
Account Balance: $ 5,132.87

TOTAL DEPOSITED IN BANKS/FINANCIAL INSTITUTIONS

$ 40,813.19

[REF: 0543)

7

(3)

No. 06-1048

Supreme Court, U.S.
FILED
MAR 0 1 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KEITH MCFARLAND,

Petitioner,

versus

BRYAN CAVE LLP, PAUL WEIL, MARSHALL & STEVENS, INC., CARL G. HOGAN, JR., BRIAN J. HOGAN, and DAVID HOGAN,

Respondents (all).

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT MARSHALL & STEVENS, INC. IN OPPOSITION TO PETITION

RUSSELL K. SCOTT
Counsel of Record
EMILY C. SCHULTZ
GREENSFELDER, HEMKER & GALE, P.C.
12 Wolf Creek, Suite 100
Belleville, Illinois 62226
(618) 257-7308

Counsel for Respondent Marshall & Stevens, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition where (1) the Seventh Circuit's order affirming the District Court's dismissal of Petitioner's second amended complaint is consistent with this Court's ruling in *Beck v. Prupis*, 529 U.S. 494 (2000); (2) the Seventh Circuit's order affirming the District Court's dismissal of Petitioner's second amended complaint does not conflict with a decision of this Court or a Court of Appeals; and (3) Petitioner does not claim that the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

M & S Acquisitions Corp. is the parent corporation of Respondent, Marshall & Stevens, Inc. No publicly held company owns 10% of Respondent, Marshall & Stevens, Inc.

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INTRODUCTION

Petitioner has presented no compelling reason for his Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioner fails to demonstrate that the Seventh Circuit's July 21, 2006 Order ("Order") is in conflict with a decision of this Court or another Court of Appeals or that the Seventh Circuit decided an important federal question that has not already been settled by this Court. *See id.* at 10(a)-(c). Indeed, this Court previously refused to recognize the identical claim asserted by Petitioner. *See Beck v. Prupis*, 529 U.S. 494, 507 (2000). The Petition should therefore be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner relies on the combined effect of two provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") that, read in conjunction, provide a civil cause of action for conspiracy. In addition, Petitioner raises various Illinois common law claims over which he asserts supplemental jurisdiction. Petitioner's purported RICO claim is his sole basis for federal jurisdiction. However, Petitioner lacks standing to bring suit under 18 U.S.C. § 1964(c) predicated on a violation of 18 U.S.C. § 1962(d) for injuries caused by overt acts that are not acts of racketeering or otherwise unlawful under RICO.

At the time of the events alleged in the second amended complaint ("complaint"), Petitioner was an employee of Respondent, Marshall & Stevens, Inc. ("M&S"), an appraisal firm incorporated in Delaware. (*See* Pet. App. at 26a-27a). The law firm of Bryan Cave, LLP

("Bryan Cave"), through its agent, Paul Weil, engaged M&S to assist in the preparation of a federal estate tax return for the Estate of Carl G. Hogan, Sr. (the "Hogan Estate"). (Pet. App. at 31a-32a). M&S in turn assigned Petitioner to provide assistance by preparing appraisals for the Hogan Estate. (Pet. App. at 33a-34a).

According to the complaint, Petitioner submitted a draft appraisal concerning one of the assets included in the Hogan Estate. (Pet. App. at 34a-35a). Petitioner alleges that the parties disagreed regarding the values he submitted. (Pet. App. at 35a-36a). He claims that he was asked to assert false values and thereby participate in a tax fraud scheme. (*Id.*). As a result of his refusal to participate, Petitioner alleges that he was "removed from working on the Hogan File and later terminated after sufficient time had passed." (Pet. App. at 36a).

Petitioner claims injuries to his "business and property." (Pet. App. at 43a.) He seeks injunctive relief, lost income and pre-judgment interest, "compensation for past and future pecuniary losses," and "compensation for past and future non-pecuniary losses." (Pet. App. at 44a). In addition, he seeks the benefit of RICO's treble damages provision (*see* 18 U.S.C. § 1964(c)), as well as punitive damages for "malicious and/or reckless conduct." (*Id.*).

The complaint makes clear that Petitioner's refusal to participate in the alleged tax fraud scheme led to the termination of his employment with M&S: "[Petitioner] refused to participate in deriving false value conclusions and refused to sign or affix his signature to said appraisal which effectuated him being removed from working on the Hogan File by the enterprise and then later being terminated from employment with [M&S]." (Pet. App. at 39a).

Moreover, the complaint establishes that the economic injuries claimed necessarily derive from Petitioner's termination. Without Petitioner's claim that he was terminated from his employment with M&S, the complaint provides no basis upon which to infer economic injury. (Pet. App. at 37a-43a).

M&S moved for dismissal based in part on Petitioner's lack of standing to assert his RICO claim. The District Court dismissed Petitioner's RICO claim with prejudice because "[Petitioner] cannot plead he was injured by an act of racketeering," and it declined to exercise supplemental jurisdiction over Petitioner's remaining state law claims. (Pet. App. at 16a). The Seventh Circuit affirmed the District Court's dismissal, holding that the District Court "correctly concluded that [Petitioner's] RICO claim is foreclosed by *Beck*." (Pet. App. at 6a).

REASONS FOR DENYING THE PETITION

Petitioner has presented no compelling reason for this Court to review the Seventh Circuit's finding that the dismissal of Petitioner's RICO claim was appropriate under *Beck v. Prupis*, 529 U.S. 494 (2000). As *Beck* makes clear, Petitioner lacks standing to bring suit under 18 U.S.C. § 1964(c) predicated on a violation of 18 U.S.C. § 1962(d) for injuries caused by overt acts that are not acts of racketeering or otherwise unlawful under RICO. Petitioner is asking this Court to disregard its precedent, without offering any valid reasons for distinguishing his claim.

Moreover, apart from *Beck*, Petitioner does not meet the basic requirements for standing under RICO. Even if

Petitioner could demonstrate the requisite standing to bring suit under 18 U.S.C. § 1964(c), the complaint fails to adequately plead the essential elements of a RICO conspiracy claim. For the reasons set forth herein, this Court should deny the Petition.

I. THE SEVENTH CIRCUIT CORRECTLY CONCLUDED THAT *BECK* MANDATES DISMISSAL OF PETITIONER'S RICO CLAIM.

In *Beck v. Prupis*, 529 U.S. 494, 495-96 (2000), this Court considered whether a person injured by an overt act done in furtherance of a RICO conspiracy has a cause of action under 18 U.S.C. § 1964(c), even if the overt act is not an act of racketeering. The facts in *Beck* are strikingly analogous to the allegations in the present case. The plaintiff Beck was a former employee and shareholder of Southeastern Insurance Group ("SIG"), and the defendants were former senior officers and directors of SIG who engaged in acts of racketeering. *Id.* at 497-98. During much of the time he was employed at SIG, Beck was unaware of the racketeering activities. Once he discovered the defendants' unlawful activity, however, he notified regulators. *Id.* at 498. The defendants then orchestrated a scheme to remove Beck from the company by creating a false report that he had failed to perform his material duties. *Id.* Beck sued the defendants asserting, *inter alia*, a civil cause of action under 18 U.S.C. § 1964(c). Beck claimed that his injuries were proximately caused by an overt act – namely, the termination of his employment – done in furtherance of the defendants' conspiracy. *Id.* at 499.

This Court found that although Beck's termination helped the defendants maintain their RICO conspiracy, it did not confer standing under 18 U.S.C. § 1964(c):

> [W]e conclude that injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO . . . is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d). As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by *any* act in furtherance of a conspiracy that might have caused the plaintiff injury. Rather, consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is . . . independently wrongful under RICO. . . . [Defendants'] alleged overt act in furtherance of their conspiracy is not independently wrongful under any substantive provision of the statute. Injury caused by such an act is not, therefore, sufficient to give rise to a cause of action under § 1964(c).

Id. at 505-06. Because Beck's alleged injuries arose from the termination of his employment, not from any actionable racketeering activity, this Court affirmed the dismissal of his RICO conspiracy claim. *Id.* at 507.

Similarly, in the case at hand, Petitioner cannot claim that the Respondents' allegedly injurious act was an essential part of a RICO conspiracy. Like Beck, Petitioner alleges that his injuries were proximately caused by an overt act – namely, the termination of his employment – done in furtherance of Respondents' purported conspiracy to commit federal tax fraud. Like Beck, Petitioner alleges nearly identical facts:

> [M&S] opined with the other members of the conspiracy that [Petitioner] had become a problem in that he would not participate in the fraud. It was believed that he might even alert government officials regarding the scheme. It was therefore agreed that [Petitioner] would be removed from working on the Hogan File and later terminated after sufficient time had passed.

(Pet. App. at 36a). The Seventh Circuit correctly analyzed these facts, facts it described as "indistinguishable in all material respects" from those in *Beck*, and concluded unequivocally that

> [t]here is no doubt that the injuries about which [Petitioner] complains and the corresponding relief that he seeks (namely, payment for loss of income and past and future pecuniary losses), were proximately caused by his termination, which, wrongful or otherwise, is not an act of racketeering for purposes of RICO.

(Pet. App. at 7a).

Petitioner suggests that the Seventh Circuit reached the wrong conclusion because it "has readily deprived [Petitioner] from having his day in court. . . ." (Pet. at 18). To the contrary, the Seventh Circuit made clear that Petitioner is free to seek various available contract and tort remedies under state law:

> Although [Petitioner] is unable to take advantage of the treble damages provisions for federal claims brought under RICO, we note in closing that his state law claims for tortuous interference of contract and slander were dismissed without prejudice. He is of course at liberty to refile these claims in state court and see how they fare in that tribunal.

(Pet. App. at 8a). Petitioner is therefore incorrect in his blanket and unsubstantiated assertion that "[m]any others finding themselves in similar situations to the [Petitioner] will also be barred unless certiorari is granted." (Pet. at 18).

II. THE SEVENTH CIRCUIT CORRECTLY REJECTED PETITIONER'S RELATED CLAIM UNDER THE HOBBS ACT.

Petitioner's reliance on the Hobbs Act, 18 U.S.C. § 1951, is a red herring. Petitioner attempts to distinguish *Beck* by arguing that, unlike Beck, he was the actual target of racketeering activity because the Respondents needed his work product, namely the appraisal report, to carry out their scheme. (Pet. at 12-13). As the Seventh Circuit noted, this argument "is irrelevant to the RICO standing analysis." (Pet. App. at 6a). Nonetheless, Petitioner continues to argue that Respondent Paul Weil's purported threats to ruin his career constituted predicate acts in furtherance of the alleged conspiracy to commit federal tax fraud. (Pet. at 3 ("Weil told [Petitioner] that he would 'ruin' [Petitioner's] career and lively hood [sic]."); Pet. at 13 ("[Petitioner] was threatened by the attorney to give up a false report and the labor it took to produce the same, in return for the attorney not destroying his career.")). Petitioner contends that "[c]ontrary to the Seventh Circuit's conclusions, the sought after appraisal had considerable value to the extortionists in ripping off the government in taxes." (Pet. at 13).

Petitioner does not allege any Hobbs Act violations by M&S. (*See* Pet. at 4 ("At this point in time neither [M&S] nor any of its employees or agents were in any way involved in the illegality of the scheme. . . . They were in no

way involved in threatening [Petitioner] or trying to influence his appraisal."); Pet. at 11 n.1 ("[M&S] was not a member of the conspiracy when that attorney made the threats. . . ."); Pet. at 12 ("The extortion attempts at first consisted of threats made by the attorney before [M&S] had joined the scheme.")). Regardless, Petitioner's argument fails against all Respondents because it again points to the fatal defect in his claim: he fails to allege any cognizable damages that were proximately caused by the purported illegal threats. Because Petitioner's alleged termination of employment is the *only basis* upon which to conclude that he was injured, his claim fits squarely within the analysis in *Beck*.

The Seventh Circuit emphasized this point as follows:

> In fact, Beck itself provides a stronger example of a plaintiff who was "specifically targeted" for unlawful activity, given that Beck alleged that the defendants in his case created an independent scheme for the sole purpose of firing him, which included hiring an independent insurance company to falsify reports against him and provide cause for his termination. The Supreme Court has made it clear that a RICO plaintiff has standing to recover only "to the extent that, he has been injured in his business or property by conduct constituting the violation," which in this case would be the [Respondents'] alleged efforts to defraud the government by filing false tax documents.

(Pet. App. at 6a-7a) (citation omitted). As such, the Seventh Circuit correctly reiterated its conclusion that

> [t]here is no doubt that the injuries about which [Petitioner] complains and the corresponding relief that he seeks (namely, payment for loss of income and past and future pecuniary losses), were

> proximately caused by his termination, which, wrongful or otherwise, is not an act of racketeering for purposes of RICO.

(Pet. App. at 7a).

Furthermore, the Seventh Circuit correctly concluded that the complaint "alleges no set of facts that constitute extortion under the Hobbs Act." *Id.* (citing *Scheidler v. Nat'l Org. of Women*, 537 U.S. 393, 404 (2003)). Petitioner's complaint concedes that he created the appraisal report in his capacity as an employee of M&S under the direction of Bryan Cave and for use by the Hogans. (Pet. App. at 31a, 33a). As such, as stated by the Seventh Circuit, Petitioner "has no right to pursue a claim that the [Respondents] wrongfully acquired *their own* appraisal reports." (Pet. App. at 8a) (emphasis in original).

III. EVEN APART FROM *BECK*, PETITIONER DOES NOT MEET THE REQUIREMENTS FOR STANDING UNDER RICO.

A plaintiff must meet two basic requirements in order to bring a civil suit under RICO. First, the alleged injury must be to the plaintiff's *business or property*, and not personal in nature. Second, the defendant's alleged acts in violation of RICO must have *proximately caused* the plaintiff's injury. Petitioner's alleged injuries fail on both counts: (1) they are personal in nature; and (2) they are not fairly traceable to the purported unlawful conduct.

A. The Injuries Alleged Are Insufficient to Give Rise to a Cause of Action Under RICO.

Only injuries to "business or property" are compensable under RICO. *See* 18 U.S.C. § 1964(c). Injuries to

"business or property" do not include personal injuries such as embarrassment, humiliation, and emotional distress, even if those personal injuries result in pecuniary loss. *Schiffels v. Kemper Finan. Servs., Inc.*, 978 F.2d 344, 353 (7th Cir. 1992), abrogated by *Beck*, 529 U.S. at 500 (narrowing the scope a civil cause of action under RICO but leaving intact *Schiffels'* determination regarding compensable injuries under RICO). Moreover, a plaintiff cannot recover under RICO for injuries resulting from extortion or intimidation, including the economic aspects of such personal injuries. *Rylewicz v. Beaton Servs., Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989). In the present case, Petitioner's claims regarding "past and future nonpecuniary losses" do not involve injuries to Petitioner's business or property and are personal in nature. As such, Petitioner may not rely on these alleged injuries to establish standing under 18 U.S.C. § 1964(c).

B. There is No Causal Connection Between Petitioner's Alleged Injuries and Respondent's Purported RICO Violations.

A RICO plaintiff can only recover for those damages *directly caused* by a defendant's RICO violations. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 259 (1992). There must be "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 266-68; *see also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985) ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, *and the racketeering activities injure the plaintiff in his business or property*, the plaintiff has a claim under § 1964(c).") (emphasis added).

To the extent Petitioner's alleged injuries can be classified as injuries to "business or property," his losses are nonetheless unrecoverable because Petitioner cannot demonstrate that these injuries were proximately caused by the Respondents' purported unlawful conduct. If Petitioner's allegations regarding the Respondents' unlawful conduct were true, such conduct could only have injured parties *other than* Petitioner, namely the federal government. There is *no nexus* between the Respondents' alleged federal tax fraud scheme and Petitioner's demand for injunctive relief, lost income and pre-judgment interest, compensation for past and future pecuniary losses, compensation for past and future non-pecuniary losses, treble damages, and punitive damages for "malicious and/or reckless conduct." These alleged injuries are too remote to confer standing upon Petitioner.

IV. PETITIONER FAILS TO PLEAD THE ESSENTIAL ELEMENTS OF HIS CLAIM.

Even if Petitioner could demonstrate the requisite standing to bring suit under 18 U.S.C. § 1964(c), the complaint fails to adequately plead the essential elements of a RICO conspiracy claim as required under Federal Rule of Civil Procedure 9(b). *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 725-26 (7th Cir. 1998) (stating that a civil RICO complaint is subject to the heightened pleading standard of Federal Rule of Civil Procedure 9(b) which requires a plaintiff to plead all averments of fraud with particularity); *R.E. Davis Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1516 (N.D. Ill. 1990) ("Courts have been particularly scrupulous in adhering to the dictate of Rule 9(b) in the RICO context."). RICO claims are to be pled with particularity in part because of the seriousness of a

fraud allegation and in order to prevent the *in terrorem* settlement effect of RICO's treble damages provision. *R.E. Davis*, 757 F. Supp. at 1516.

Moreover, the RICO conspiracy provision "should not be used by the courts to criminalize mere association with an enterprise." *Goren*, 156 F.3d at 731-32 (citing *United States v. Neapolitan*, 791 F.2d 489, 498 (7th Cir. 1986)). Rather, "the touchstone of liability under § 1962(d) is an agreement to participate in an endeavor which, if completed, would constitute a violation of the substantive statute." *Id.* (citing *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 960 (7th Cir. 1996)). In *United States v. Neapolitan*, the Seventh Circuit analyzed the nature of such an agreement:

> [A] conspiracy to violate RICO can be analyzed as composed of two agreements: an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts. Thus, a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise. *If either aspect of the agreement is lacking then there is insufficient evidence that the defendant embraced the objective of the alleged conspiracy*. Thus, mere association with the enterprise would not constitute an actionable 1962(d) violation.

791 F.2d 489, 499 (citations omitted) (emphasis added).

Accordingly, in order to state a claim for conspiracy under 18 U.S.C. § 1962(d), a plaintiff must allege with particularity that (1) each defendant agreed to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering; and (2) each defendant further agreed that, in furtherance of this goal, someone would commit at least two predicate acts. *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 600 (7th Cir. 2001); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 965 (7th Cir. 2000). Petitioner's complaint fails in both respects: (1) it does not allege with particularity that M&S agreed to participate in an enterprise; and (2) it does not allege with particularity that M&S agreed to the commission of two predicate acts in furtherance of the purported enterprise.[1]

A. Petitioner Does Not Allege that M&S Agreed to Participate in an Enterprise.

"It is well established that a complaint may be dismissed if it contains only conclusory, vague and general allegations of a conspiracy." *Goren*, 156 F.3d at 733. In

[1] Although the complaint attempts to allege a cause of action for conspiracy, it is worth noting that Petitioner fails to allege a viable cause of action under 18 U.S.C. § 1962(c) as well. In order to state a viable cause of action under 18 U.S.C. § 1962(c), Petitioner must allege: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Goren*, 156 F.3d at 727. In cases involving substantive claims under *both* 18 U.S.C. § 1962(c) and § 1962(d), this Court has held that the failure to establish a violation of § 1962(c) is conclusive regarding a § 1962(d) claim based upon the same facts. *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 677 (7th Cir. 2000) ("Since [plaintiffs] fail to establish a violation of section 1962(c), their section 1962(d) claim based on the same facts must fail as well.") (citing *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1026 (7th Cir. 1992)).

order to state a claim under 18 U.S.C. § 1962(d), a plaintiff "must allege facts from which one can infer *each defendant's* agreement to violate § 1962(c)." *Schiffels*, 978 F.2d at 352 (emphasis added). More specifically, each defendant "must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner." *Brouwer*, 199 F.3d at 967. Although each defendant need not agree to operate or manage the enterprise, each defendant must agree to "facilitate the activities of those who do." *Id.*

18 U.S.C. § 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Thus, the definition of "enterprise" encompasses two types of associations: (1) recognized legal entities and (2) extra-legal associations in fact. *United States v. Turkette*, 452 U.S. 576, 581 (1988). Either type must have "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (internal quotation marks omitted). Further, an enterprise must be more than a group of people who get together to commit a pattern of racketeering activity, and there must be structure and goals separate from the predicate acts themselves. *Id.* at 645.

Petitioner does not allege, nor can it be reasonably inferred from the complaint, that M&S agreed to participate in an enterprise to violate RICO. To the contrary, the complaint generally states that M&S "agreed for a certain fee to prepare appraisals" for the Hogan Estate and that M&S "thereafter renegotiated its fee with the Enterprise."

(Pet. App. at 33a, 36a). Petitioner then asserts the unsubstantiated conclusion that M&S "agreed to participate in the Enterprise and conspiracy by providing false appraisal values for the purpose of federal and state estate tax returns," describing M&S as "a new member of the Enterprise." (Pet. App. at 36a). Beyond these blanket assertions, the complaint provides no details as to the roles played by the individual Respondents, nor does it allege any facts indicating an agreement by the individual Respondents as to which roles they would play in the alleged enterprise. *See R.E. Davis*, at 1526 (concluding that "[e]ven the most generous interpretation of this boilerplate allegation would not enable it to survive the motion to dismiss, for the complaint is bare of factual allegations from which one might infer that defendants agreed among themselves to conduct [their] affairs through a pattern of racketeering activity.").

B. Petitioner Does Not Allege that M&S Agreed to the Commission of at Least Two Predicate Acts.

In order to state a claim under 18 U.S.C. § 1962(d), Petitioner need not allege an agreement by each of the Respondents to individually commit two predicate acts of racketeering activity. He must, however, allege an agreement by *each Respondent* to the commission (by someone) of two specific predicate acts *on behalf of the alleged enterprise*. *Goren*, 156 F.3d at 732. It is insufficient for Petitioner to allege an agreement by the Respondents "to a single transaction with the alleged enterprise." *Id.* In addition, with respect to 18 U.S.C. § 1962(c) which forbids "conduct of [an] enterprise's affairs through a pattern of racketeering activity," the term "through" has been

interpreted by this Court to mean "by means of, in consequence of, by reason of." *United States v. Kovic*, 684 F.2d 512, 517 (7th Cir. 1982) (citing *United States v. Nerone*, 563 F.2d 836, 851 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978)).

18 U.S.C. § 1961 sets forth an exhaustive list of acts of "racketeering" commonly referred to as "predicate acts." *See* 18 U.S.C. §§ 1961(1)(A), (B). In an effort to substantiate his claim that Respondents agreed to the commission of at least two specific predicate acts, Petitioner cites various activities prohibited under 18 U.S.C. § 1961. He asserts conclusory, vague and general allegations regarding the Respondents collectively and their purported activities in contravention of 18 U.S.C. § 1957 (prohibiting the engagement in monetary transactions using property derived from specified unlawful activity), 1951 (prohibiting interference with commerce by threats or violence), and 1510 (prohibiting obstruction of criminal investigations). (*See* Pet. App. at 39a-40a). In addition, Petitioner alleges in boilerplate terms that "[c]ontemplated in the conspiracy to violate 18 U.S.C. § 1962(c) was that the participants of the enterprise would necessarily violate the 18 U.S.C. § 1341 mail fraud and 18 U.S.C. § 1343 wire fraud provisions of law by utilization of the United States Postal Service and telephone/email communications to facilitate the scheme." (Pet. App. at 40a). Petitioner then describes ten "transmittals" between the Respondents, all of which related to the parties' *lawful* duties as described by Petitioner (Pet. App. at 31a-33a), and none of which are alleged to have been communicated for the purpose of injuring Petitioner. (Pet. App. at 41a-43a).

A plaintiff alleging the predicate act of mail fraud must do so with particularity pursuant to Federal Rule of

Civil Procedure 9(b). *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 599 (7th Cir. 2001). In order to satisfy Rule 9(b) in this regard, a plaintiff must "allege the identity of the person who made the representation, the time, place and content of the misrepresentation, *and the method by which the misrepresentation was communicated to the plaintiff.*" *Id.* (citing *Vicom, Inc. v. Harbridge Merchant Serv., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994)). Again, Petitioner's lack of standing to raise his RICO conspiracy claim is evident. Taking Petitioner's allegations as true, it cannot be reasonably inferred from the complaint that Petitioner was the intended target of any of these alleged misrepresentations.

More importantly, however, the complaint is utterly devoid of allegations concerning *each Respondent's* agreement to the commission of these activities. There is no basis upon which to infer that these alleged activities were *on behalf of* the purported enterprise. Petitioner cannot escape the fact that throughout his complaint, he continuously refers to an alleged agreement by the Respondents "to a single transaction with the alleged enterprise," namely to falsify estate tax returns relating to the Hogan File. *See Goren*, 156 F.3d at 732. Given its lack of particularity concerning the nature and scope of the enterprise, the complaint "*cannot be saved by its many conclusory and vague allegations concerning the collective conduct of the defendants.*" *Goren*, 156 F.3d at 733 (quotations omitted) (emphasis added).

CONCLUSION

Because Petitioner has not established any compelling reasons for this Court to grant the Petition, Respondent, Marshall & Stevens, Inc., respectfully requests that the Petition be denied.

Respectfully submitted,

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No. 06-1048

IN THE

Supreme Court of the United States

Keith McFarland,

Petitioner,

v.

Bryan Cave LLP, Paul Weil, Marshall & Stevens, Incorporated, Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether petitioner has stated a RICO conspiracy claim since he is unable to identify any property obtained by the conspirators pursuant to the alleged predicate Hobbs Act violation as required by *Scheidler v. Nat'l Organization for Women Inc.*, 537 U.S. 393 (2003).**

2. **Whether petitioner has standing under RICO to recover for alleged wrongful termination of his employment and, if so, whether *Beck v. Prupis*, 529 U.S. 494 (2000), should be overruled.**

3. **Whether petitioner has adequately pleaded a pattern of racketeering activity.**

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No. 06-1048

In The
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Keith McFarland, Petitioner,
v.

Bryan Cave LLP, Paul Weil, Marshall & Stevens, Incorporated, Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan, Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Defendants-Respondents Bryan Cave LLP, Paul Weil, Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan file this Brief in Opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Because this case arises from a motion to dismiss, the factual allegations in the Amended Complaint are taken as true.

On January 14, 2001, Carl G. Hogan, Sr. died, leaving his three sons as co-executors of his estate. His sons hired Paul Weil, an attorney at Bryan Cave LLP to assist in the preparation of estate tax returns. Plaintiff alleged that these

defendants formed a conspiracy "whose fundamental goal was to illegally prepare and file federal and state tax returns" (App. 32a).

Plaintiff Keith McFarland was assigned to the Hogan file to prepare an appraisal of a Hogan real estate development partnership. McFarland claimed that during a conference with Weil and other appraisers, Weil attempted to influence his valuations by supplying what plaintiff believed to be false information. Weil allegedly threatened to ruin plaintiff's career if he did not agree to modify his appraisal.

McFarland advised his employer, Defendant-Respondent Marshall & Stevens ("M&S"), that in his view it would be illegal to provide appraisals based on the values that had been generated. He recommended that M&S withdraw from the project. Thereafter, plaintiff alleged, M&S renegotiated its fee with the Hogans and agreed to join in the conspiracy to defraud the government (App. 25a). When McFarland refused to join in the purported conspiracy, M&S announced that he had become a problem (App. 36a). The would-be conspirators agreed that all of McFarland's prior draft appraisals would be destroyed (App. 36a). As a result of his refusal to sign the appraisal, McFarland was removed from the Hogan file and was later terminated from M&S (App. 39a).

Defendants filed motions to dismiss arguing, among other things, that McFarland lacked standing to bring an action under RICO because he had not been injured by an act of racketeering. The district court found this issue dispositive, noting that the proximate cause of McFarland's injury was the termination of his employment. "All of the damages he seeks result from his loss of employment as an appraiser for M&S" (App. 15a). Relying on this Court's decision in *Beck v. Prupis*, 529 U.S. 494, 500 (2000), the district court explained that:

> "The rationale behind the requirement that a plaintiff's injuries must have been proximately caused by acts of racketeering is that RICO was enacted with an express target — racketeering activity — and only those injuries that are proximately caused by racketeering activity should be actionable under the statute. As a result, McFarland does not have standing to bring a RICO claim as he has not been injured by an act of racketeering." (App. 15a-16a)(citations omitted).

The court refused to exercise supplemental jurisdiction over the state law claims in Counts II and III and dismissed those counts without prejudice (App. 16a-17a).

The Seventh Circuit affirmed in an unpublished opinion, finding the facts at issue in *Beck* "indistinguishable in all material respects." (App. 6a). The Court of Appeals explained that the Supreme Court had made it clear that a RICO plaintiff has standing to recover only to the extent that he has been injured in his business or property by conduct constituting the violation, which in this case would be the defendants' alleged efforts to defraud the government by filing false tax documents. The court noted that the injuries about which McFarland complains, and the corresponding relief that he seeks, were proximately caused by his termination which, wrongful or otherwise, is not an act of racketeering (App. 7a).

REASONS FOR DENYING THE PETITION

The unique facts of this case provide no basis for this Court's exercise of its certiorari power, as plaintiff's Amended

Complaint does not state a viable RICO claim, and the ruling below does not conflict with any decision of any of the circuits and, in fact, is squarely consistent with this Court's existing jurisprudence.

I. Because McFarland Is Incapable of Identifying Any Property Obtained by the Purported Conspirators, His Claim for Violation of the Hobbs Act Fails as a Matter of Law.

Plaintiff argues that a violation of the Hobbs Act constitutes a sufficient predicate act to support his claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. §1951; 18 U.S.C. §§ 1962(c)-(d), 1964(c). The Hobbs Act proscribes, in relevant part, acts of robbery or extortion that obstruct, delay, or affect commerce. 18 U.S.C. §1951(a). The Act defines the term "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b). The critical issue facing McFarland is whether he is capable of identifying the property that the purported conspirators "obtained," as required by this Court's decision in *Scheidler v. Nat'l Organization for Women Inc.*, 537 U.S. 393 (2003).

Plaintiff argues that defendants committed extortion by appropriating his property consisting of the false appraisal reports he refused to generate while working on the Hogan file. McFarland explains that he was "threatened by the attorney to give up a false report and the labor it took to produce the same, in return for the attorney not destroying his career." (Pet. 13). He concludes that his extortion claim under the Hobbs Act should not have been dismissed since "the property attempted to be acquired had actual and substantial value that would have

ended up in the hands of extortionists." (Pet. 13). This argument suffers from a number of serious flaws.

At the outset, it is questionable whether McFarland's "property" actually exists. He pleaded that he refused to prepare the so-called falsified appraisal report. If so, how could the purported conspirators possibly "obtain" property that never came into existence? Similarly, how could the conspirators obtain "the labor it took to produce" the falsified report, when McFarland steadfastly refused to engage in such labor?

If, as alleged, the purported conspirators placed great value on the preparation of a false appraisal report, the fact remains that they never obtained such a report from McFarland. As for the report he did prepare, McFarland pleaded that the conspirators agreed to destroy it.

RICO is concerned only with actual, concrete financial losses. *See Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994) (holding that, for RICO standing, the plaintiffs must prove a "concrete financial loss," an actual loss "of their own money," and "not mere 'injury to a valuable intangible property interest'"). McFarland is incapable of identifying any concrete loss of property.

The Court of Appeals took a different approach, assuming that the property at issue existed, but rejecting the notion that the conspirators somehow obtained it. The court explained that McFarland conceded in his Second Amended Complaint that the appraisal report was not his own property. Rather, the report was something he created as an employee of M&S, and it belonged to his employer. The Seventh Circuit concluded that McFarland cannot pursue a claim that defendants wrongfully acquired their *own* property. So viewed,

McFarland's claim for violation of the Hobbs Act defies common sense.

In his Petition, McFarland takes issue with the Court of Appeals' reasoning, arguing that M&S was not part of the conspiracy at the time the alleged threats to his livelihood were made. Therefore, McFarland reasons, he owned the appraisal report (that he refused to create), and M&S did not acquire its own property (Pet. 11). The argument strains credulity. McFarland offers no elaboration as to how he obtained property rights in a report that he refused to create for the benefit of his employer.

McFarland's purpose in advancing these arguments is to substantiate a perceived conflict between the Court of Appeals' decision in this case and this Court's opinion in *Scheidler*, 537 U.S. 393. In *Scheidler*, the Court held that a violation of the Hobbs Act requires not only the deprivation of property, but also the acquisition of property. *Id.* at 404. To hold otherwise, the Court explained, would eliminate the recognized distinction between extortion and the separate crime of coercion. *Id.* at 405.

Curiously, McFarland's primary argument, indeed the caption of his argument, asserts that the Court of Appeals' decision somehow undermines *Scheidler*. McFarland offers the irrelevant observation that prior to this Court's decision in *Scheidler*, courts "found little difficulty upholding extortion cases in which the extortionist didn't own the property or had some legal right to it." (Pet. 12). The Court of Appeals' decision in this case properly followed *Scheidler*, holding that one cannot violate the Hobbs Act without actually obtaining property owned by another. While McFarland appears to be invoking the rationale of *Scheidler*, in actuality the acceptance of his position would require the overruling of *Scheidler*.

McFarland has proffered no reasonable argument for revisiting *Scheidler*, nor has he identified any conflict among the circuits on this issue. The convoluted nature of his argument is reason, in and of itself, to deny his Petition for Certiorari.

II. Retaliatory Discharge for a Refusal to Participate in Illegal Activities Cannot Form the Basis of a RICO Conspiracy Claim.

McFarland also argues that the Court should accept this garden-variety, state-law wrongful termination case because the decision below undermines this Court's decision in *Beck v. Prupis*, 529 U.S. 494 (2000). That is a fairly remarkable statement since the circumstances at issue here are almost identical to those in *Beck*, and both the district court and Court of Appeals dismissed this case on the basis of that decision. Indeed, the Court of Appeals found the facts in this case to be "indistinguishable in all material respects" from *Beck*, and its ruling closely parallels that decision.

In *Beck*, this Court held that an injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a cause of action under the Act. The Court of Appeals concluded that McFarland's claim, and the relief he seeks, were proximately caused by the termination of his employment, which is not an act of racketeering. Accordingly, in full accord with this Court's decision in *Beck*, the Court of Appeals affirmed the district court's order dismissing the case. This Court could not reach a contrary decision without overruling *Beck*.

It is now well established that whistle-blowers, or those who suffer an adverse employment action after reporting alleged RICO violations, do not have standing to sue under

RICO for the injury caused by their firing, since the causal nexus between the predicate acts and the employer's decision to take action against the whistle-blowing employee is too tenuous. *Cullom v. Hibernia Nat. Bank*, 859 F.2d 1211, 1216 (5th Cir. 1988). Put simply, retaliatory discharge for a refusal to participate in illegal activities cannot form the basis of a RICO conspiracy claim. *O'Malley v. O'Neill*, 887 F.2d 1557, 1562 (11th Cir. 1989).

As McFarland points out, a plaintiff's right to sue under RICO requires a showing that the defendant's violation was not only a "but for" cause of his injury, but was the proximate cause as well. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Under *Holmes*, RICO claims require a direct relation between the injury asserted and the injurious conduct alleged. In the present case, there is no connection at all between the purported conspirators' goal of defrauding the government and McFarland's termination. Accordingly, McFarland is incapable of establishing the element of proximate causation for his RICO action.

A recent decision of this Court is instructive. In *Anza v. Ideal Supply Corp.*, 126 S.Ct. 1991 (2006), the plaintiff, Ideal, alleged that a business competitor harmed it by defrauding the government tax authority and using the proceeds from the fraud to offer lower prices. This Court held that Ideal could not maintain a RICO claim because there was no direct connection between Ideal's injury and the tax scheme; the direct victim was the State of New York, not Ideal. *Id.* at 1997. The Court concluded that there is "no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." *Id.* at 1998. The same analysis applies to the present case, which alleges a conspiracy to defraud the government, not McFarland.

III. The Petition Should be Denied Because McFarland Has Failed to Plead a Pattern of Racketeering Activity.

The Court of Appeals, as well as the district court, found that McFarland has no standing to pursue a RICO claim based on this Court's decision in *Beck v. Prupis*, 529 U.S. 494 (2000). Even if we assume that McFarland's allegations support a claim for violation of the Hobbs Act and that *Beck* has no application to this case, the complaint nevertheless fails to state a claim under RICO. Hence, certiorari should be denied.

To adequately plead a RICO claim under §1962(c), a plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985); *Goren v. New Vision Int'l., Inc.*, 156 F.3d 721, 727 (7th Cir. 1998). Allegations of fraud in a RICO action are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *Id.* at 727. In addition to McFarland's lack of standing to bring a RICO action, his complaint is deficient due to a failure to plead a pattern of racketeering activity.

A pattern of racketeering activity requires the commission of at least two predicate acts of racketeering committed within a ten-year period. 18 U.S.C. § 1961(5). Although at least two predicate acts of racketeering are necessary to form a pattern, two acts alone generally will not suffice. *H.J. Inc. v. Northwestern Bell Tel. Co .*, 492 U.S. 229, 237 (1989).

In addition to at least two predicate acts, a RICO plaintiff must show "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *Id.* at 239. In other words, plaintiff must satisfy the so-called "continuity plus relationship" test: the predicate acts

must be related to one another and pose a threat of continued criminal activity. *Id.* at 239; *see also Sedima*, 473 U.S. at 497 n. 14.

The alleged pattern of racketeering activity in this case appears to be a "closed-ended" pattern under the RICO analysis, in that the predicate acts were completed when the object of the pattern was achieved. Where schemes that have a clear and terminable goal have a natural ending point, such schemes cannot support a finding of any specific threat of continuity. *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 782 (7th Cir. 1994).

A closed-ended pattern of racketeering — a scheme that has ceased to exist — still exhibits the requisite continuity if the predicate acts extended over "a substantial period of time" and threaten to recur in the future. *H.J. Inc.*, 492 U.S. at 242. In making that determination, courts employ the multifactor continuity test outlined in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986). Under *Morgan*, continuity is a function of: (1) the length of time over which the predicate acts were committed; (2) the number and variety of predicate acts; (3) the number of victims; (4) the presence of separate schemes; and (5) the occurrence of distinct injuries. *Id.* at 975. This test is to be applied with an eye toward achieving a "natural and common sense" result, recognizing that Congress was concerned in RICO with long-term criminal conduct. *Vicom*, 20 F.3d at 780 citing *H.J. Inc.*, 492 U.S. at 242.

A. Duration of the Conspiracy

The first factor, duration, is "the single most important aspect of the closed-ended continuity analysis" and is "perhaps the closest thing we have to a bright-line continuity test." *Vicom*, 20 F.3d at 780; *Midwest Grinding Co. Inc. v. Spitz*, 976

F.2d 1016, 1024 (7th Cir. 1992). Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. RICO is concerned with long-term criminal conduct. *H.J. Inc.*, 492 U.S. at 242.

In *Vicom*, for example, the court found that the durational aspect of closed-ended continuity was not satisfied by racketeering predicates spanning a nine-month period. *Vicom*, 20 F.3d at 771. In *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 663 (7th Cir. 1992), the court found no pattern where a single scheme occurred over a period of years.

In another case, a scheme that lasted at most seven to eight months was held to be precisely the type of short-term, closed-ended fraud that has consistently been deemed not to constitute a pattern. *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 922 (7th Cir. 1992). In the case at bar, the alleged scheme lasted, at most, eight months. Thus, McFarland's complaint fails to demonstrate the durational aspect necessary to establish a pattern of racketeering.

B. Number and Variety of Predicate Acts

While plaintiff claims that defendants used interstate wires multiple times to conduct the scheme, repeated use of the mails or wires does not by itself form a pattern. *Hartz v. Friedman*, 919 F.2d 469, 473 (7th Cir. 1990). Although the sheer number of predicate acts might appear at first glance to prove continuity, when it comes to a pattern premised on acts of mail or wire fraud, the volume of mailings is not dispositive. *Midwest Grinding*, 976 F.2d at 1024. The allegations of mail fraud do not pass the *Morgan* test for the number or variety of predicate acts required to show a pattern of racketeering.

C. Number of Victims

In this case, the purported conspiracy had two targets — the State of New Hampshire and the federal government. The fact that there were only two targets of the purported conspiracy further demonstrates that there was no pattern of racketeering.

D. Existence of Separate Schemes

McFarland alleged a single scheme to file false estate tax returns for a single estate. This factor, perhaps more than any other, demonstrates that he is incapable of establishing a pattern of racketeering. Taking together the predicate acts alleged and the *Morgan* multifactor analysis, the conclusion is inescapable that McFarland's allegations cannot support a finding of closed-ended continuity. The closed-ended RICO scheme plaintiff alleged has none of the trappings of a long-term criminal operation that carries with it a continued threat to society. Certiorari should be denied under circumstances where, leaving the issue of standing aside, the complaint fails to state a cause of action.

CONCLUSION

For the reasons stated, Defendants-Respondents Bryan Cave LLP, Paul Weil, Carl G. Hogan, Jr., Brian J. Hogan, and David Hogan respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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No. 06-1048

In the
Supreme Court of the United States

Keith McFarland,
Petitioner,
V.

Bryan Cave LLP, Paul Weil
Marshal & Stevens, Incorporated,
Carl G. Hogan, Jr., Brian J. Hogan
and David Hogan,
Respondents (all).

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING ON
PETITION FOR WRIT OF CERTIORARI

On April 2, 2007, this Court denied Plaintiff's Petition for Writ of Certiorari by unsigned order. That petition stemmed from the Seventh Circuit's unpublished order affirming the District Court's dismissal of Plaintiff's suit based on RICO against the law firm of Bryan Cave LLP, its clients, and the appraisal firm of Marshall & Stevens Incorporated. The underlying allegations were that the law firm and its clients sought to defraud the state and federal governments of millions of dollars through a fraudulent tax scheme via estate tax returns.

This Court's alignment with the District Court, and the Circuit Court's unbecoming and unpublished opinions, must fail on the following grounds which are either limited to intervening circumstances or to other substantial grounds not previously presented.

1. The spirit of the protections of the United States Constitution was intended to prevent secret and unpublished dispositions or debates of wrongful acts by powerful people, as has happened here. Special favor has followed the defendants in the case from day one. In the District Court, the trial judge for some reason held "off the record status conference" yet by its own device warned the plaintiff therein of the heightened pleading requirements of fraud. The defendants filed stays of discovery obviously not wanting Plaintiff to obtain copies of the tax returns in question. These stays were remarkably granted and after sitting on motions to dismiss for more than six months the District Court dismissed Plaintiff's cause by an unpublished Rule 53 Order. Chicago favored the defendants even more than East St. Louis. Granting oral argument on the briefs, the Circuit Court then took almost eight months to issue

its unpublished disposition which appeared to be more of a critique of a muffin recipe than that of a multi million dollar tax fraud scheme. This type of aristocrat protectionism was not the cause for which our founders brought forth the Constitution, nor should it be the cause this Court adopts by silent pass.

2. During the proceedings in the Circuit Court, the mediation services of the court were engaged and those proceedings lasted many more weeks than is typical. The Monday morning following the Friday afternoon of the impassible breakdown of settlement negotiations, United States Senator John Danforth's office announced that Mr. Danforth would immediately rejoin practice with the law firm of Bryan Cave LLP. Of all that can be said about the appearance of this, at the very least, is whether or not to give an up or down vote to hear this cause should be made with reference to whether or not Justice Thomas believes he is compelled to refrain from participating in that decision.

CONCLUSION

For the forgoing reasons this petition for rehearing and a writ of certiorari should be granted.

Respectfully submitted,

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April 27, 2007

SUPREME COURT RULE 44.2 CERTIFICATION

Pursuant to Supreme Court Rule 44.2, I hereby certify that the above petition is restricted to grounds limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds previously not presented, and is otherwise presented in good faith and not for delay.

Respectfully Submitted
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April 27, 2007